Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

FRANK O'BANNON, in his official capacity as Governor of Indiana,

Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

PARTIES TO THE PROCEEDINGS

The plaintiffs are the Indiana Civil Liberties Union, Joan Laskowski, Alice Bennett, James A. Tanford, Steven Schroeder, Patrice Muumba Abduallah, Reverend Kevin Armstrong, Rabbi Eric Bram, and Dr. Edgar Towne. The sole defendant is Frank O'Bannon in his official capacity as Governor of Indiana.

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PETITION FOR A WRIT OF CERTIORARI

Indiana Governor Frank O'Bannon respectfully petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Seventh Circuit affirming the preliminary injunction of the United States District Court for the Southern District of Indiana.

OPINIONS BELOW

The Seventh Circuit's opinion is published at 259 F.3d 766 (7th Cir. 2001) and is reprinted in the appendix at App. 1a-27a. The Order Granting Preliminary Injunction of the United States District Court for the Southern District of Indiana is published at 110 F. Supp. 2d 842 (S.D. Ind. 2000), and is reprinted at App. 28a-61a.

JURISDICTION

The Court of Appeals issued its opinion and judgment on July 27, 2001. The Seventh Circuit denied Petitioner's timely filed Petition for Rehearing *En Banc* on October 2, 2001. App. 62a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. Section 1 of the Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

> law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, §1.

STATEMENT

The Ten Commandments have played a critical role in the development of Western Civilization generally and in the development of the American legal tradition in particular. *See, e.g., Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *City of Elkhart v. Books*, 121 S. Ct. 2209, 2211-12 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) (stating that the Commandments "have made a substantial contribution to our secular legal codes" and recognizing that Elkhart's monument "simply reflects the Ten Commandments' role in the development of our legal system"); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 652-53 (1989) (Stevens, J., concurring in part and dissenting in part) (stating that the frieze on the south wall of the Court's courtroom depicting Moses holding the Ten Commandments "signals respect not for great proselytizers but for great lawgivers").[1] This case asks whether governments may display the Ten Commandments to memorialize that crucial historical role.

Last term the Court, over a dissent joined by three justices, denied certiorari in another government Ten Com-

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[1] *See also, e.g.*, Russell Kirk, *The Roots of American Order* 29, 45 (1974) (writing that, "from Israel, even more than from the Roman jurisconsults, America inherited an understanding of the sanctity of law" and that "Revelation in the Old Testament . . . is the form of revealed truth upon which American order depends") (footnote omitted).

mandments display case, *City of Elkhart*, 121 S. Ct. at 2210 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari). But many other state and local governments across the country display (or wish to display) the Ten Commandments. Despite repeated litigation of the issue, the lower courts (including the courts of appeals) continue to be divided on whether such displays are permissible. *See, e.g.*, App. 38a (noting "the profusion and confusion reflected in the case law and in Supreme Court precedent"). And, unlike the monument in *City of Elkhart*, the monument in this case was specifically designed to include other historical texts in order to display the Commandments as part of a broader display of historical texts having an influence on the laws of the State of Indiana, and on the Nation as a whole. Certiorari is therefore warranted to resolve the lower courts' conflicts on the important and recurring issue of when the government may display the Ten Commandments.

1. On March 14, 2000, Indiana Governor Frank O'Bannon accepted for display on the Indiana Statehouse lawn a monument donated by the Indiana Limestone Institute featuring the Ten Commandments, the Bill of Rights, and the Preamble to the 1851 Indiana Constitution.[2] App. 2a, 3a, 8a. The monument, to be located among numerous other historical markers, was intended to replace another Ten Commandments monument donated by the Fraternal Order of Eagles in 1958 that sat on the Statehouse lawn until it was

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[2] The Preamble to the 1851 Indiana Constitution states:

> To the end, that justice be established, public order maintained, and liberty perpetuated: We the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

App. 4a. The Preamble is not identified as such on the monument. *Id.*

vandalized in 1991. App. 2a, 4a. Respondent Stephen Schroeder was convicted of spray-painting, breaking, and toppling the prior monument. App. 68a; *see also* Susan Dillman, *Decalogue Display Under Challenge*, South Bend Tribune, May 19, 2000, at D1, *available at* 2000 WL 20362744.

The new monument has four sides and is seven feet tall, six feet, seven inches wide, and four feet, seven inches deep. App. 3a. The Ten Commandments and Bill of Rights each occupies one of the larger sides, with the top arched in the form traditionally used to depict the stone tablets Moses carried from the top of Mount Sinai. App. 3a, 4a. The Preamble to the Indiana Constitution is printed on one of the smaller sides. App. 4a. The other smaller side of the new monument states: "Gift of the Indiana Limestone Industry—2000 A.D. This Monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of the Eagles on October 25, 1958." App. 4a.

The portion of the Indiana Statehouse lawn where the monument is to be placed is about 1.93 acres in size. App. 64a. It features twelve other historical markers, including two monuments honoring the National Road (U.S. 40, which formerly ran adjacent to the Statehouse lawn), a monument honoring Indiana women, two friezes depicting Civil War scenes, a marker showcasing the history of the Statehouse, statues of Christopher Columbus, George Washington, Robert Dale Owen, a coal miner, Vice-President and Governor Thomas A. Hendricks and Governor Oliver H.P. Morton. App. 5a, 22a, 30a. The Statehouse lawn also has seven dedicated trees. App. 5a.

When he accepted the monument, Governor O'Bannon remarked that the new monument was intended to "be an integral part of the Statehouse setting, which honors the history of our state and nation." App. 8a, 72a. The prior

monument, said the Governor, "stood on the Statehouse lawn as a reminder of some of our nation's core values." App. 71a. On the new monument, he said, the Ten Commandments "will stand alongside the abiding principles of our form of government, especially its protections of individual rights. . . . They're ideals we all need to be reminded of from time to time." *Id.*

2. In May 2000, plaintiffs filed this action under 42 U.S.C. § 1983 alleging that the Governor's acceptance of the new monument and his plan to place it on Statehouse grounds violated the Establishment Clause. App. 5a. Because the plaintiffs alleged a violation of the U.S. Constitution and section 1983, the district court had federal question jurisdiction under 28 U.S.C. § 1331. Plaintiffs sought a preliminary injunction against displaying the monument, and on July 28, 2000, the district court entered a preliminary injunction prohibiting the Governor from displaying the monument on the Statehouse lawn. App. 28a.

Applying the general framework used in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and more particularly the endorsement test articulated in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring), the district court examined "'whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" App. 48a (citation omitted). The district court concluded that reasonable observers would view the monument as a state endorsement of religion for two central reasons: (1) the text of the Ten Commandments is too isolated by appearing alone on one of the two wider surfaces of the monument; and (2) there was no "explanatory marker" linking the discrete texts appearing on the monument. App. 55a-56a. The district court also concluded that, even if passersby could not read the monument without approaching it, the monument's tablet

shape would convey its religious character from a distance. App. 57a.

Further, although it acknowledged that the government's secular purpose "need not be the exclusive purpose" behind the monument (App. 40a), the district court necessarily found that, in light of the monument's design, Governor O'Bannon's stated secular purpose was a disingenuous sham. *Compare id.* with App. 47a.

3. A divided panel of the Seventh Circuit affirmed the preliminary injunction. Applying the purpose and effect prongs of the Establishment Clause test provided in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the court, notwithstanding the Governor's statement that the monument was intended to "be an integral part of the Statehouse setting, which honors the history of our state and our nation" (App. 72a), held that "[t]he Ten Commandments is still an inherently religious text, and we conclude that the State has not articulated a valid secular justification for planning to erect the monument." App. 9a. The court reasoned that the Ten Commandments "are historical, secular 'core values' only to those who adhere to them" and that the monument therefore reflected a religious purpose. *Id.* "Moreover," the court ruled, "the monument's physical design belies any suggestion that these texts are presented as a whole to remind viewers of the core values and legal ideals of our nation." *Id.* [3]

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[3] Though the Seventh Circuit affirmed the district court "pending resolution on the merits" (App. 13a), the court also bluntly stated that "we are hard-pressed to believe that a trial on the merits will support a different conclusion." App. 12a-13a (citation omitted). For this reason, and because the case was presented to the district court mostly on a stipulated record (App. 28a), this case is as ready for review by the Court as if final judgment had been entered. *Cf. Ashcroft v. ACLU*, 121 S. Ct. 1997 (2001) (granting certiorari to review case at preliminary injunction

In addition, the court stated that "[t]he permanence, content, design, and context of the monument amounts to the endorsement of religion by the state." App. 12a. The court recognized that "the grounds house other statues and monuments" and indeed "are somewhat akin to a museum." App. 10a. Nonetheless, the court thought that the monument would convey the message of endorsement of religion because, among other reasons, it is tablet-shaped and the Commandments are inscribed in one-inch capital letters while the Bill of Rights (owing to its lengthier text) is inscribed in five-eighths-inch capital letters on the opposite side. App. 11a.

The court also was troubled that the side of the monument featuring the Ten Commandments was not "visually connected" to the sides featuring the Bill of Rights and the 1851 Indiana Preamble, and thus that a reasonable observer "would be hard-pressed to make any analytical connection between the texts . . . ." App. 11a-12a. Yet at the same time the court also worried that "an observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. This would signal that the state approved of such a link, and was sending a message of endorsement." App. 12a.

4. In dissent, Judge Coffey criticized the majority for "seem[ing] to go out of its way to second guess Governor O'Bannon's stated purpose for the proposed monument in an attempt to discredit that purpose." App. 20a. He stated that "[s]imply because some religious meaning is conveyed by a monument does not destroy a state's valid secular purposes for its display." App. 16a (citations omitted).

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stage); *City of Indianapolis v. Edmond*, 528 U.S. 1153 (same), *aff'd*, 531 U.S. 32 (2000).

In Judge Coffey's view, the monument's presentation of the Ten Commandments with the Bill of Rights and the 1851 Preamble distinguishes this monument. By including three historical texts, the monument "presents three important steps in the development of the law as they affect 1) the people of the world; 2) the citizens of the United States; and 3) the citizens of the State of Indiana." App. 18a. Accordingly, to Judge Coffey, the overall message of the monument is secular, not religious. *See* App. 20a-23a.

Furthermore, according to Judge Coffey, "the layout of the monuments that adorn the Statehouse lawn also serves to diminish any perceived endorsement of religion . . . ." App. 22a. With twelve other monuments, busts, and friezes, "the Statehouse lawn is an area dedicated to monuments that pay due homage to both the state's and the nation's history that serves to situate the monument in an appropriate *cultural* and *historical* context." *Id.* This context, in Judge Coffey's view, "only serves to reinforce the secular nature of the monument in question as set forth and clearly delineated in Governor O'Bannon's press release." App. 23a.

In sum, Judge Coffey reasoned:

> If the Ten Commandments properly convey a secular message when adorning the wall of a Federal Courtroom, I cannot understand how the State of Indiana's proposed placement of the three-sided monument amidst twelve other secular symbols of the nation's legal and cultural history fails to similarly convey a secular message.

App. 17a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW EXACERBATES A CONFLICT AMONG THE SEVENTH CIRCUIT, THE TENTH CIRCUIT AND THE COLORADO SUPREME COURT

The Seventh Circuit's decision directly conflicts with holdings of the Tenth Circuit and the Colorado Supreme Court that the Establishment Clause permits government to display the Ten Commandments.

In *Anderson v. Salt Lake City Corp.* 475 F.2d 29 (10th Cir. 1973), the court upheld a city's display on courthouse grounds of a Ten Commandments monument.[4] *Anderson* recognized that "the Decalogue is at once religious and secular" and that "an ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character—it also has substantial secular attributes." *Id.* at 33. *Anderson* also stated that the display was "a depiction of a historically important monument with both secular and sectarian effects." *Id.* at 34. Indeed, *Anderson* found the Ten Commandments monument—which, unlike the monument at issue here, included no other historical documents—to be "primarily secular." *Id.*

This ruling conflicts with the Seventh Circuit's holding that "the Ten Commandments is . . . an inherently religious text" (App. 9a) and that the inclusion of the Bill of Rights

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[4] *Anderson* remains the controlling Tenth Circuit authority concerning government displays of the Ten Commandments. *See Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001); *see also Books v. City of Elkhart*, 235 F.3d 292, 318 & n.4 (7th Cir. 2000) (Manion, J., dissenting) (relying on *Anderson* and explaining why *Anderson*'s holding is not affected by *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam)), *cert. denied*, 121 S. Ct. 2209 (2001).

and the 1851 Preamble along with the Ten Commandments would infect those secular texts with a religious aura rather than emphasize the overall secular nature of the monument. App. 12a. This ruling cannot be squared with *Anderson*'s holding that the Ten Commandments is a secular "foundation for law" that merely happens to "reflect the religious nature of an ancient era," that the government may display. *Anderson*, 475 F.2d at 34.[5]

The Seventh Circuit's decision also conflicts with the decision of the Colorado Supreme Court in *State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc), which approved a Ten Commandments monument on the grounds of the Colorado State Capitol. There, the court was persuaded that the Ten Commandments convey secular history because they have "served over time as a basis for our natural law" and the moral standards they articulate "have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution." *Id.* at 1024 (recounting undisputed testimony). The Seventh Circuit, however, concluded that the Ten Commandments are "inherently religious" and therefore do not reasonably communicate a secular historical message (App. 9a), a ruling that cannot be squared with *Colorado*.

Indeed, *Colorado* embraced the government's secular role in communicating the complete history of our nation—even the religious part: "[D]ue to our past it would be inaccurate to ignore a history that includes religion." *Colorado*, 898 P.2d at 1025. Thus, while the Seventh Circuit intimated that the government could post the Ten

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[5] *See also Suhre v. Haywood County*, 55 F. Supp. 2d 384, 397 (W.D. N.C. 1999) (upholding a courtroom display featuring the Ten Commandments, Lady Justice and the flags of North Carolina and the United States because it "touts nothing more than an effort to recall the origin of modern law, by reference to an ancient source of law and justice").

Commandments only if it first excised references to God or religion (App. 9a), the Colorado Supreme Court concluded that barring a government display of the Ten Commandments merely because of such references would inappropriately require "callous indifference" to religious groups and prefer "non-believers over believers." *See Colorado*, 898 P.2d at 1026.

And unlike the Seventh Circuit, *compare* App. 10a-13a, *Colorado* also found that the Ten Commandments monument communicated secular history because it was displayed among other monuments representing "a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is also Colorado." *Colorado*, 898 P.2d at 1025. The Ten Commandments monument itself, while it featured no other historical texts, included Christian, Jewish, and Egyptian symbols, as well as a bald eagle and an American flag. These features, *Colorado* ruled, "sufficiently neutralize [the Ten Commandments'] religious character resulting in neither an endorsement nor a disapproval of religion." *Id.* at 1019.

The decision below is thus fundamentally in conflict with the decisions in *Anderson* and *Colorado*. The Court should grant certiorari to resolve this conflict.

II. THE PERMISSIBILITY OF GOVERNMENT TEN COMMANDMENTS DISPLAYS IS AN IMPORTANT AND RECURRING ISSUE

Several challenges to government Ten Commandments displays are pending in many jurisdictions, and all will benefit from guidance from the Court. *See Adland v. Russ*, 107 F.Supp. 2d 782 (E.D. Ky. 2000), *appeal pending*, No. 00-6139 (6th Cir. argued Nov. 2, 2001); *Doe v. Harlan County*, 145 F.Supp. 2d 845 (E.D. Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU v.*

McCreary County, 145 F.Supp. 2d 845 (E.D. Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU v. Pulaski County*, 145 F.Supp. 2d 845 (E.D. Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir. filed July 26, 2001); *ACLU v. Garrard County*, No. 01-CV-481 (E.D. Ky. filed Nov. 27, 2001); *ACLU v. Grayson County*, No. 01-CV-202 (W.D. Ky. filed Nov. 27, 2001); *ACLU v. Mercer County*, No. 01-CV-480 (E.D. Ky. filed Nov. 27, 2001); *ACLU v. Rowan County*, No. 01-CV-220 (E.D. Ky. filed Nov. 27, 2001); *Hoffman v. City of Mishawaka*, No. 3:01-CV-00780 (N.D. Ind. filed Nov. 2, 2001); *Glassroth v. Moore*, No. 01-CV-1268 (M.D. Ala. filed Oct. 30, 2001); *Freethought Society v. Chester County*, No. 01-CV-5244 (E.D. Pa. filed Oct. 16, 2001); *ACLU v. Plattsmouth*, No. 4:01-CV-3109 (D. Neb. filed May 17, 2001); *Christian v. City of Grand Junction*, No. 01-CV-685 (D. Colo. filed Apr. 16, 2001); *Modrovich v. Allegheny County*, No. 2:01-CV-531 (W.D. Pa. filed Mar. 20, 2001); *ACLU of Ohio v. Ashbrook, et al.*, No. 1:01-CV-556 (N.D. Ohio filed Mar. 8, 2001); *King v. Richmond County*, No. 00-CV-100 (S.D. Ga. filed May 12, 2000); *Baker v. Adams County*, No. C-1-99-094 (S.D. Ohio filed Feb. 2, 1999).

In addition, there are hundreds of government Ten Commandments displays across the country. *See Books v. City of Elkhart*, 235 F.3d 292, 294-95 (7th Cir. 2000) (describing the efforts of the Fraternal Order of Eagles to donate monuments of the Ten Commandments to be displayed on government property across the country), *cert. denied*, 121 S. Ct. 2209 (2001). Given the frequency with which the ACLU's chapters have sued to enjoin these omnipresent displays, it is reasonable to expect that many more lawsuits will follow.

Government interest in displaying the Ten Commandments only continues to grow. At least five states have enacted legislation authorizing displays of the Ten

Commandments in historical contexts on public grounds or in public schools. *See* Ind. Code §§ 4-20.5-21-2 (West Supp. 2001) and 36-1-16-2 (West Supp. 2001); Ky. Rev. Stat. § 158.195 (Michie 2001); N.M. Stat. §§ 22-15-15 to 22-15-20 (Michie 2001); N.C. Gen. Stat. § 115C-81(g)(3b) (1999); and S.D. Codified Laws § 13-24-17.1 (Michie Supp. 2001). Furthermore, in the last two years, legislatures in Alabama, Colorado, Florida, Georgia, Illinois, Maine, Michigan, Mississippi, Missouri, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania and Tennessee all reportedly considered taking steps to support, permit or require government or public school displays of the Ten Commandments. Hanna Rosin, William Claiborne, *Taking the Commandments Public; Indiana Passes Bill Allowing Display in Schools, Other Government Facilities*, The Washington Post, Feb. 8, 2000, at A3; Americans United For Separation of Church and State: State Legislative Update For The 2001 Sessions, *at* http://www.au.org/states.htm (last visited December 26, 2001). Such legislative approaches are part of a more general movement to post the Ten Commandments in government buildings and public schools. Rosin and Claiborne, *supra*.

Similarly, Congress has recently considered legislation endorsing government displays of the Ten Commandments. In 1999, the House of Representatives passed the Ten Commandments Defense Act, which would have recognized the abilities of state and local governments to post the Ten Commandments in public places. H.R. 1501, 106th Cong. § 1202 (1999). The larger bill of which the Act was a part died thereafter, but the House's passage of the Ten Commandments Defense Act demonstrates the growing importance of the issue to many public officials.

In sum, a decision from the Court addressing when governments may display the Ten Commandments is of great and growing importance.

III. THE DECISION BELOW IS WRONG

A. The Court Misapplied The Endorsement Test

The Seventh Circuit's decision would prohibit nearly any government display of the Ten Commandments and accordingly is at odds with *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

Lynch held that government may display a crèche on public property while depicting the historical origins of Christmas as a National Holiday. *Lynch*, 465 U.S. at 680, 687. Similarly, *Allegheny* approved a display of a Christmas tree and a Menorah, erected near a sign saluting liberty, in front of a city-county building. *See* 492 U.S. at 578, 621. The Menorah-Christmas tree presentation—unlike the stand-alone crèche that *Allegheny* invalidated—conveyed messages that were sufficiently secular to avoid any endorsement of the Christian and Jewish faiths or any establishment of religion. *Id.* at 616 (opinion of Blackmun, J.); *see also id.* at 635 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 655 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Rather than being exclusively, or even "inherently" religious, the Ten Commandments is at least as (if not more) susceptible to a historic, secular presentation as a crèche, a Christmas tree, and a Menorah. While it invalidated a law requiring the Ten Commandments to be posted in schoolrooms, *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), did not foreclose government displays of the Ten Commandments in contexts that better communicated their historical, rather than religious, significance. The constitutional problem in *Stone*, which must be understood in the context of inculcating school children, was that the Commandments were posted alone on a schoolroom wall, a

circumstance that induced students to meditate on them during the school day. *See Stone*, 449 U.S. at 42; *see also City of Elkhart v. Books*, 121 S. Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting from denial of certiorari). But *Stone* expressly recognized that the Ten Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics . . . ." *Stone*, 449 U.S. at 42. And *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987), recognized that *Stone* "did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization."

The Seventh Circuit, however, erroneously ruled that the Ten Commandments is "inherently religious" to the exclusion of any secular significance, despite the presence of other historical texts and monuments. It held, contrary to the rationales of *Lynch* and *Allegheny*, that the presence of secular texts accompanying the monument—the Bill of Rights and the 1851 Preamble—underscores religious endorsement. App. 12a. Under that view, *no* Ten Commandments display on the Statehouse lawn would pass muster. Any attempt to emphasize the Commandments' historical importance by displaying them with historical government documents would be met with an "impermissible link" rejoinder. *See id.*

Our Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673 (citations omitted); *see also Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment) ("Clearly, the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement."). The Seventh Circuit's opinion fails to apprehend that the Constitution does not require complete exclusion of all references to religion from the public square.

Quite to the contrary: It effectively bans references to religion from the public square.

B. The Court Misapplied The Secular Purpose Rule

The Seventh Circuit also misapplied the rule that the State must have a secular purpose in displaying the Ten Commandments. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). *Lynch* held that a state's purpose in displaying a religious symbol is valid unless it is "motivated *wholly* by religious considerations." *Lynch*, 465 U.S. at 680 (emphasis added); *see also City of Elkhart v. Books*, 121 S. Ct. 2209, 2212 (2001) (Rehnquist, C.J., dissenting from denial of certiorari) ("In determining whether a secular purpose exists, we have simply required that the displays not be 'motivated wholly by religious considerations.'" (quoting *Lynch*, 465 U.S. at 680)). The Seventh Circuit instead evaluated whether the State's purpose in erecting the challenged monument was "primarily secular." App. 9a. Further, the court ignored the principle that federal courts reviewing Establishment Clause claims are "reluctan[t] to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned . . . ." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). Rather than defer to the Governor's stated secular purpose that the monument was to be "an integral part of the Statehouse setting, which honors the history of our state and our nation" (App. 72a), the court necessarily (and improperly) treated those statements as a sham. *See Edwards*, 482 U.S. at 586-87 ("the Court is normally deferential to a state's articulation of a secular purpose" unless it is a "sham").

The court's further pronouncement that the Ten Commandments "are historical, secular 'core values' only to those who adhere to them" (App. 9a) is wholly without foundation. The Ten Commandments' role in the

development of Western law and civilization is a matter of historical fact, not a tenet of religious belief. "Historically speaking, such are the Hebraic roots of American order, whether or not the reader of this book wholly accepts the Law and the prophets." Russell Kirk, *The Roots of American Order* 38 (1974). To deem the Ten Commandments inappropriate for a government historical display simply because it has both religious and historical import is to insist on inaccurate and incomplete public displays of history.

Finally, the court also concluded that, "since each text stands apart, the monument's physical design belies any suggestion that these texts are presented as a whole to remind viewers of the core values and legal ideals of our nation." App. 9a. But, as discussed above, the court also worried that the close association of the Bill of Rights and the 1851 Preamble with the Ten Commandments suggested endorsement. App. 12a. Had the court simply deferred to the Governor's purpose unless it was *wholly* religious, it could have avoided this contradiction.

C. Displaying The Ten Commandments Does Not Establish Religion Any More Than Other Acceptable Government Religious References

As Judge Coffey observed in dissent, "[w]here a religious symbol has a landmark foundation and meaning in the history of our country," the government may display the symbol regardless of analysis under *Lemon* or the endorsement test. App. at 23a-24a. For example, a legislature may hire a chaplain to conduct legislative prayer without explicitly satisfying *Lemon*. *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)). Similarly, the "common sense of the matter"—and not necessarily rigorous analysis under *Lemon*—permits, for example, the Court to open its sessions with "God save the United States and this Honorable Court" and for the currency to bear the motto "In God We Trust."

Zorach v. Clausen, 343 U.S. 306, 312-123 (1952); *see also Marsh*, 463 U.S. at 792; App. 25a.

Such practices are acceptable without reference to *Lemon* because each "is simply a tolerable acknowledgement of beliefs widely held among the people of this country." *Marsh*, 463 U.S. at 792. Further, the "history and ubiquity" of these practices enables them to convey a message related to common secular culture rather than religion. *See Lynch*, 465 U.S. at 693 (O'Connor, J., concurring). For the same reasons, displaying the Ten Commandments on government property as part of a broader historical commemoration is permissible. *See Suhre v. Haywood County*, 55 F. Supp. 2d 384, 392, 397 (W.D. N.C. 1999) (recounting testimony that the Ten Commandments are "part of public life" and concluding that a historic government display of the Ten Commandments is "more secular" than other "ceremonial dieisms" [*sic*] that are permissible).

Here, Governor O'Bannon has simply decided to display the Ten Commandments on the Statehouse lawn. How is that an *establishment* of religion? As a mere "passive acknowledgement" of the role of the Ten Commandments in society, the monument here benefits religion no more than other religion-related "practices that are accepted in our national heritage." *Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Justice Brennan's dissent in *Marsh* underscores this point. Even though he disapproved of legislative prayer because it is a religious act, Justice Brennan allowed that "the text of Abraham Lincoln's Second Inaugural Address which is inscribed on a wall of the Lincoln Memorial need not be purged of its profound theological content." *Marsh*, 463 U.S. at 811 (Brennan, J., dissenting). The State's monument is acceptable in the same way because it does not coerce adherence and represents "merely an acknowledge-

ment of the historical fact that the Ten Commandments served as an integral part of the foundation for our country's legal system." App. 26a. The State's monument thus poses "no greater potential for establishment of religion" than Lincoln's address—or, for that matter, the depictions of Moses holding the Ten Commandments on the south wall of the Court's courtroom and on the Supreme Court building's East Pediment. *See Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in the judgment in part and dissenting in part); *see also id.* at 652-53 (Stevens, J., concurring in part and dissenting in part).

Our Founders created secular government and prohibited government establishment of religion, but the Ten Commandments profoundly influenced those Founders as well as the endurance of the Republic. The State's monument—with its seminal secular charters of state and federal government, set among numerous markers honoring the history of the State of Indiana and the Nation—merely commemorates the profound historical influence of the Commandments. Such commemorations establish no religion whatever, and so are fully consonant with the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: December 28, 2001

In the
United States Court of Appeals
For the Seventh Circuit

No. 00-3011

INDIANA CIVIL LIBERTIES UNION, JOAN LASKOWSKI, ALICE BENNETT, ET AL.,

Plaintiffs-Appellees,

v.

FRANK O'BANNON, GOVERNOR OF INDIANA,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division
No. 00 C 811—**Sarah Evans Barker**, *Judge*.

ARGUED JANUARY 9, 2001—DECIDED JULY 27, 2001

Before FLAUM, *Chief Judge*, and BAUER and COFFEY, *Circuit Judges*.

BAUER, *Circuit Judge*. This case comes to us upon the district court's grant of a preliminary injunction. On appeal, the dispute concerns whether plaintiffs are likely to succeed on the merits. Akin to our recent decision in *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000),[1] we must determine

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[1] On May 29, 2001, the Supreme Court denied the petition for a writ of certiorari in our opinion in *Books*. *See Elkhart v. Books*, 121 S. Ct. 2209, 2209 (2001). Chief Justice Rehnquist, joined by Justices Scalia and Thomas dissented from the denial of certiorari, and Justice Stevens issued a statement in support of the denial. Justice Stevens wrote:

whether a monument to be placed on state government property will violate the Establishment Clause of the First Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment. "This task requires that we examine the history of the monument's placement and maintenance as well as the physical characteristics of the monument and of the surrounding area," *Books*, 235 F.3d at 294, and then apply the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). We have completed this work and affirm the district court's entrance of the preliminary injunction pending resolution on the merits.

BACKGROUND

As detailed in *Books*, 235 F.3d at 294-95, the Fraternal Order of the Eagles donated plaques inscribed with a version of the Ten Commandments (developed by representatives of Judaism, Protestantism, and Catholicism) to communities across the United States during the 1950s. In 1958, one of the plaques was erected on the Indiana Statehouse grounds in downtown Indianapolis, where it stood until smashed by a vandal in 1991. Indiana State Representative Brent Steele arranged for the creation of a new monument to replace the destroyed plaque. The Indiana Limestone Institute generously agreed to donate both limestone and labor for this purpose. Steele, also an attorney, surmised that it would be

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> Even though the first two lines of the monument's text appear in significantly larger font than the remainder, they are ignored by the dissenters. Those lines read: "THE TEN COMMANDMENTS—I AM the LORD thy GOD." The graphic emphasis placed on those first lines is rather hard to square with the proposition that the monument expresses no particular religious preference . . . .

121 S. Ct. at 2210. The denial of certiorari in *Books*, coupled with Justice Stevens' statement, makes our reasoning and decision in this case all the more sound.

legally prudent if, in addition to the Ten Commandments, the new monument displayed historical texts. The texts he chose were the Bill of Rights from the United States Constitution and the Preamble to the 1851 Indiana Constitution.

The planned monument consists of two pieces of limestone—a four-sided block resting upon a rectangular base—and will weigh 11,500 pounds. The two wider sides of the four-sided block are carved into rounded arcs at the top, which resemble tablets, a form typically used in artistic depictions of the stone tablets delivered by Moses upon returning from Mt. Sinai. The monument will stand seven feet tall; six feet, seven inches wide; and four feet, seven inches deep. On one of the wide surfaces, the following version of the Ten Commandments will be engraved in one inch, all capital lettering:

Ten Commandments

I. Thou shalt have no other Gods before me

II. Thou shalt not make unto thee any graven image

III. Thou shalt not take the name of the Lord thy God in vain

IV. Remember the Sabbath day to keep it holy

V. Honor thy father and thy mother that thy days may be long in the land which the Lord thy God giveth thee

VI. Thou shalt not kill

VII. Thou shalt not commit adultery

VIII. Thou shalt not steal

IX. Thou shalt not bear false witness against thy neighbor

X. Thou shalt not covet thy neighbor's house or wife or anything that is thy neighbor's

The other wide surface will display the Bill of Rights in five-eighths inch, all capital lettering. On one of the smaller sides the 1851 Indiana Constitution Preamble will be inscribed, which states:

> To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

The 1851 Preamble will not be clearly identified as such. The other small side will read:

> Gift of the Indiana Limestone Industry—2000 A.D.
> This monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of the Eagles on October 25, 1958

The record is not clear as to the exact size of the lettering for the 1851 Preamble and the dedication.

The Statehouse park-like grounds span almost two acres and are home to many Indiana government buildings, including the Capitol Building, the Governor's office, the General Assembly, the Indiana Supreme Court, the Indiana Court of Appeals, and other state offices. The grounds are surrounded by Ohio Street to the north, Washington Street to the south, Capitol Avenue to the east, and Senate Avenue to the west. There are numerous monuments currently on the

grounds, including two monuments honoring the civil engineering of the National Road (U.S. Highway 40), a marker honoring the women of Indiana, two friezes depicting Civil War scenes, a marker describing the Statehouse's history, and statues of Christopher Columbus, George Washington, a coal miner, and Indiana Governors Thomas A. Hendricks and Oliver H.P. Morton. The grounds also showcase seven dedicated trees. The planned site for the monument at issue in this case is the southwest corner of the grounds, about forty-one feet from one of the trees and ninety-two feet from the National Road monument, although precisely where and in what direction it will face is as of yet undetermined.

In May of 2000, plaintiffs filed an action under 42 U.S.C. § 1983, claiming that acceptance of the monument and the plan to erect it on the grounds of the Indiana Statehouse was state action that violated the Establishment Clause. On July 28, 2000, the district court granted plaintiffs' motion for a preliminary injunction precluding the State from erecting the monument pending resolution on the merits. *See Indiana Civil Liberties Union v. O'Bannon*, 110 F. Supp. 2d 842 (S.D. Ind. 2000).[2] The district court held that the plaintiffs had demonstrated a likelihood of success on the merits by showing that the state action violated both of the first two prongs of the *Lemon* test.

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[2] Shortly after entrance of the preliminary injunction in this case, Representative Steele asked the President of the Lawrence County Commissioners, Timothy P. Terry, if the monument could be erected on the Lawrence County Courthouse lawn until a decision in this appeal was issued. The Commission voted to accept the monument for display. Not surprisingly, the erection of the monument on the Courthouse lawn spurred the filing of an identical case, which is also being handled by Judge Barker. *See Kimbley v. Lawrence County*, 119 F. Supp. 2d 856 (S.D. Ind. 2000).

Under the first prong of the *Lemon* test, the district court reasoned that the State's purpose in displaying the monument was to advance religion because the State had not shown a historical link between most of the Ten Commandments and the ideals of government and the legal system, that the monument's tablet-shaped design was religious in nature, the Ten Commandments would be displayed apart from the other texts, and there was no explanation on the monument that the Ten Commandments was being displayed for its historical significance. Under the second prong, the district court reiterated that the content, shape, size, design, permanence, and location at the seat of Indiana's government, would lead a reasonable observer to believe that the Ten Commandments were "marked with the stamp of government approval."

The State's appeal asks for the vacation of the preliminary injunction because the plaintiffs have not shown that they are likely to succeed on the merits.

DISCUSSION

A preliminary injunction is an extraordinary remedy intended to preserve the status quo until the merits of a case may be resolved. A preliminary injunction may be issued only if the moving party demonstrates some likelihood of success on the merits, an inadequate remedy at law, and irreparable harm if denied. If these elements are demonstrated, the court must balance the irreparable harm the nonmovant will suffer if relief is granted and the irreparable harm to the movant if relief is denied. The court must also consider the public interest in either the grant or denial of the relief. When a district court grants a preliminary injunction, we review conclusions of law *de novo* and findings of fact for clear error while giving substantial deference to the district court's discretionary acts of weighing evidence or

balancing equitable factors. *See Cooper v. Salazar*, 196 F.3d 809, 813 (7th Cir. 1999).

Deciding the merits of this case involves the application of the *Lemon* test. Under *Lemon*, the Establishment Clause is violated if any of the following are found: (1) the state action does not have a secular purpose; (2) the primary effect of the state action is the advancement or inhibition of religion; or (3) the state action fosters excessive entanglement with religion. *See* 403 U.S. at 612-13. In this case, the parties only invoke the first two prongs, which have been refined and dubbed the "endorsement test." *See Books*, 235 F.3d at 301. Under the endorsement test we focus on whether the state's action has the purpose or effect of conveying a message of endorsement or disapproval of religion. *See id.* at 302.

I. Secular Purpose

Under the first prong of the *Lemon* test, we ask whether the State's actual purpose in planning to erect this monument on the Statehouse grounds is to advance or inhibit religion. *See id.* We have recognized that the Ten Commandments is a religious and sacred text that transcends secular ethical or moral concerns. *See id.* This is so in part because its very text commands the reader to worship only the Lord God, to avoid idolatry, to not use the Lord's name in vain, and to observe the Sabbath. These particular commandments are wholly religious in nature, and serve no conceivable secular function. Yet, we have also recognized that the Ten Commandments "can no doubt be presented by the government as playing . . . a role in our civic order." *Id.* at 302-03 (recognizing the secular nature of the frieze on the wall of the United States Supreme Court depicting Moses holding the Ten Commandments alongside other "great lawgivers" or the secular use of the Ten Commandments in

public schools to study history, civilization, ethics, or comparative religion).

Since displaying the text of the Ten Commandments may have a legitimate secular purpose, the state bears the burden of demonstrating "that it has taken steps to 'obviate its religious purpose.'" *Id.* at 303 n.8 (quoting *Gonzales v. North Township*, 4 F.3d 1412, 1421 (7th Cir. 1993)). We generally defer to the purpose offered by the state for its action as long as it is not a sham. Beyond assessing the purpose expressly articulated by the state, we ensure that the stated secular purpose is legitimate by also examining the context and the content of the display. *See id.* at 302-04.

Since the new monument will be significantly different than the 1958 version, we do not rely on the stated purpose for the display of the 1958 plaque. Therefore, the March 14, 2000 press release issued by Governor O'Bannon announcing that Indiana would accept the new monument provides the state's stated purpose for agreeing to erect the monument. In the press release, Governor O'Bannon stated:

> For more than three decades, a monument inscribed with the Ten Commandments stood on the Statehouse lawn as a reminder of some of our nation's core values. Soon those words will stand alongside the biding principals of our form of government, especially its protections of individual rights. They're ideals we all need to be reminded of from time to time.

Citing *State v. Freedom From Religion Found., Inc.*, 898 P.2d 1013 (Colo. 1995), the State adds that the display reflects the ideals of our legal system. Regarding the context of the monument, Governor O'Bannon stated: "The new monument will be an integral part of the Statehouse setting, which honors the history of our state and our nation." As for

the monument's content, the State points out that most of the words displayed on it are secular in nature. In sum, the State says that the monument is intended to honor our history by reminding society of its core values and to honor our legal tradition since several of our secular laws are parallel to the Ten Commandments.

We start by saying that the display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular. The Ten Commandments is still an inherently religious text, and we conclude that the State has not articulated a valid secular justification for planning to erect the monument.

The stated purpose that the Commandments will remind society of its "core values" is akin to the purpose of providing a "code of conduct" rejected in *Books*. We stated: "The code chosen, however, was a religious code that focuses not only on subjects that are the legitimate concern of civil authorities, but are subjects that are beyond the ken of any government and that address directly the relationship of the individual human being and God." 235 F.3d at 303. The Commandments are historical, secular "core values" only to those who adhere to them. This is all the more true since the version here, as noted, maintains the religion-based commandments. Moreover, since each text stands apart, the monument's physical design belies any suggestion that these texts are presented as a whole to remind viewers of the core values and legal ideals of our nation. While we hold that the State's articulated purposes are not secular ones, we go on to consider the next prong of the *Lemon* test.

II. Primary Effect

Under the second prong, we ask, irrespective of the state's stated purpose, whether accepting this monument for

display on the Statehouse grounds has the primary effect of conveying a message that the state is advancing or inhibiting religion. *See id.* at 304. The question is: would a reasonable person believe that the display amounts to an endorsement of religion? "An important concern of the effects test is . . . whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Id.* at 305 (quotations omitted). Again, to answer these questions we examine the content and context of the display. *See id.* at 304-06.

The State argues that the other statues and monuments help neutralize any religious message emanating from the Ten Commandments because they lend a historical context. It is true that the grounds house other statues and monuments, which certainly helps the State's case because the grounds are somewhat akin to a museum, and "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1983) (O'Connor, J., concurring). But, this is not simply some museum nestled in some secluded park. The grounds, which house, among other things the Capitol, the Governor's office, the General Assembly, the Indiana Supreme Court, and the Indiana Court of Appeals, is the seat of Indiana government. "[We subject] to particularly careful scrutiny displays at the seat of government." *Books*, 235 F.3d at 305 (discussing *Harris v. City of Zion*, 927 F.3d 1401 (7th Cir. 1999); *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987)). Given that these grounds are home to all of the branches of Indiana's government, we are hard-pressed to conclude anything other than that a reasonable observer would think that this monument, regardless of the message it conveys, occupies this location

with the support of the state government. And, since we find that a reasonable observer would think the monument conveys a religious message, we hold that it impermissibly endorses religion.

The large limestone monument, weighing just under six tons and standing seven feet tall and four feet wide, will be a permanent fixture on the Statehouse grounds. Its very format conveys a religious message. The limestone blocks are tablet-shaped, so, particularly given its height, even from afar the religious nature of the monument is suggested to observers. The lettering of the Ten Commandments is larger (one-inch capital lettering) than the Bill of Rights inscribed on the other side (five-eighths inch capital lettering), making the Commandments more prominent to observers. The State explains that the lettering sizes are difference because the Ten Commandments consists of fewer words than that of the Bill of Rights, and therefore, the lettering of the Bill of Rights is necessarily smaller so that it can fit on the face of the stone.

While this is an eminently reasonable reason, it is of no matter unless a reasonable observer would surmise such, which we doubt. But, even if a reasonable observer would surmise such, the fact that the Ten Commandments is in larger lettering also means that it can be observed more clearly from a distance. And, depending on from which direction an observer approaches, he or she may only view the Commandments by peering back, for it stands alone on one side, totally isolated form the other texts. So, approaching from one side, an observer would only see the Ten Commandments, reasonably leading he or she to believe that the monument only displayed the sacred text.

The placement of the texts on different sides also inhibits observers from visually connecting the texts. We further hazard that since the texts are not visually connected, a

reasonable observer would be hard-pressed to make any analytical connection between the texts, particularly since the planned monument lacks any marker explaining why these particular texts have been combined, although somewhat separately, on one slab of limestone. A reasonable observer would not necessarily link all three of these texts to society's legal development and history. A reasonable person will think religion, not history.

Nothing in the context of the monument itself or the surrounding grounds mitigates the religious message conveyed. The monument is a display distinct both in its placement by other statues and monuments and in its content. *See generally County of Allegheny v. ACLU*, 492 U.S. 573, 598 n.48 (1988). There are no other monuments or statues directly near this one and there is no unifying historical or legal significance between this monument and the others.

Moreover, an observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. This would signal that the state approved of such a link, and was sending a message of endorsement. *See Books*, 235 F.3d at 307 (finding that the placement of the American Eagle gripping the national colors at the top of a plaque inscribed with the Ten Commandments endorsed a link between religion and civil government); *City of Zion*, 927 F.2d at 1412 (finding that the placement of a Latin cross surrounded by other symbols of city life on a municipality's corporate seal endorsed a link between Christianity and government).

The permanence, content, design, and context of the monument amounts to the endorsement of religion by the state. Our holding is in regards to the likelihood of success on the merits based on the facts available to us at this

preliminary stage, but we are hard-pressed to believe that a trial on the merits will support a different conclusion. *See ACLU v. City of St. Charles*, 794 F.2d 265, 269 (7th Cir. 1986).

CONCLUSION

We AFFIRM the district court's entrance of the preliminary injunction, pending resolution on the merits.

COFFEY, *Circuit Judge*, dissenting. I do not disagree with the majority's presentation of the facts at issue before us. The state of Indiana plans to erect a monument on Indiana Statehouse grounds that is to be engraved on various sides with the Ten Commandments, the Bill of Rights, and the Preamble to the Indiana Constitution ("Preamble") on its sides. The plan to erect the monument originated after vandals destroyed a monument inscribed with the Ten Commandments, which had previously stood on the Statehouse grounds since 1958. I respectfully dissent because I believe that applying *Lemon* and its progeny should lead us to the conclusion that the proposed monument by the State of Indiana is not constitutionally prohibited under the Establishment Clause.

I. *Lemon* Test

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court adopted a three-part test for analyzing Establishment Clause cases. Initially, the government's challenged practice must have a secular purpose. Second, the principal or primary effect must be one that neither *advances* nor *inhibits* religion. Third, the government's practice must not create an excessive entanglement of

religion. Because the third prong is not at issue, the discussion focuses on the first two prongs.

The *Lemon* test continues to be criticized. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 120 S.Ct. 2266, 2284-85 (2000) (Rehnquist, C.J., dissenting); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (Scalia, J., concurring in judgment); *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). Although the *Lemon* test remains the framework under which we analyze an Establishment Clause issue, I believe it helpful to always bear in mind the text of the First Amendment, which is fundamental and clear:

> Congress shall *make no law* respecting *an establishment of religion*, or *prohibiting the free exercise thereof.*

U.S. CONST., amend. I (emphasis added).

The Establishment Clause was intended to prohibit the establishment of a national church and also to prohibit the Federal Government from preferring one religious denomination over others. *See Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting). It was never intended to "*build a wall of separation*" between government and religion. *See id.* at 98 (Rehnquist, J., dissenting). The wholesome neutrality guaranteed by the Establishment and Free Exercise Clauses *does not dictate the obliteration of all the nation's religious traditions.* Indeed, as the Supreme Court has noted, "no significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). The Constitution does not "*require complete separation of church and state; it affirmatively mandates accommodation,*

not merely tolerance, of all religions, and *forbids hostility toward any*." *Id.* (emphasis added).[1]

Judges and legal scholars agree that the *Lemon* test has led to inconsistent results. *See Wallace*, 472 U.S. at 110-11 (Rehnquist, J. dissenting) (discussing inconsistencies brought about by the Supreme Court's Establishment Clause jurisprudence). It is possible to pick and choose from the myriad of case law dealing with the Establishment Clause to find case law to suit each and every position on any given factual situation. For example, public monuments invoking the deity offend the Constitution, but mottos emblazoned on coins or religious language contained in Constitutions or in the Bill of Rights do not. Teenagers may not participate in school-organized prayer at football games, but Congress, the courts, and state legislatures may open sessions with a prayer. In the end, the Court annually picks the winners and losers in a game of free-exercise roulette, expanding or contracting the Establishment Clause as it sees fit to permit or deny the claimed exemption in a given term. Nevertheless, I acknowledge without hesitation that we are bound to apply *Lemon,* though I contend that no matter how

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[1] While I obviously recognize the constitutional distinction between state and private action, I am surprised that the First Amendment has been used at times to protect pornography (and those who distribute and possess it) and private religious proselytization, while at the same time also been used to prohibit well-intentioned communities from expressing their understanding of our nation's history and culture and from making any reference to God. Indeed, people can receive pornography through the mail, over the internet, on their televisions because of the simple premise that one may turn it off. But wouldn't a person passing the proposed monument also be free to believe whatever he or she wants, to pass it by and thereby turn it off? In my opinion, the pornography available on the internet (often sent unsolicited) and religious proselytizers who come to people's homes seems far more invasive and difficult to "turn off" than a monument that sits passively among a beautiful grassy lawn adorned with monuments that honor the history of our nation and also the State of Indiana.

the test is applied in the factual situation before us, the proposed monument can withstand constitutional scrutiny.

A. Secular Purpose

Under *Lemon*, the government's challenged practice must have a secular purpose. In determining whether a secular purpose exists, the Supreme Court merely requires that the displays not be "motivated wholly by religious considerations." *Lynch*, 465 U.S. at 680. This monument consists of three sides—two of which are completely secular in nature. Simply because some religious meaning is conveyed by a monument does not destroy a state's valid secular purposes for its display. *See Lynch*, 465 U.S. at 680; *Bridenbaugh v. O'Bannon*, 185 F.3d 796, 800 (7th Cir. 1999).

The majority concludes that "[t]he Ten Commandments is still an inherently religious text, and . . . that the State [of Indiana] has not articulated a valid secular justification for planning to erect the monument." The Commandments are a "sacred text in the Jewish and Christian faiths," concerning, in part, the "religious duties of believers." *Stone v. Graham*, 449 U.S. 39, 41-42 (1980). But neither *Stone*, nor any other Supreme Court decision for that matter, even suggests that the Ten Commandments are without a secular significance. Indeed, *Stone* noted that "integrated into the school curriculum" the Commandments "may constitutionally be used in an appropriate study of history, civilization, [or] ethics." *Id.* at 42.

The text of the Ten Commandments "no doubt has played a role in the *secular* development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Books v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000). Six of the Ten Commandments are, in fact, wholly secular, and form the

basis of much of our modern codes of criminal conduct. The historic, secular nature of the Ten Commandments is recognized inside the walls of the United States Supreme Court, one of which is adorned with a frieze that contains Moses holding the Ten Commandments, alongside other historic figures, both religious and secular. *See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 652 (1989) (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated that the placement of these historic figures together on the frieze signals a respect for great lawgivers, not great proselytizers, which is a fitting message for the wall of a courtroom. *See id.* at 652-53. If the Ten Commandments properly convey a secular message when adorning the wall of a Federal Courtroom, I cannot understand how the State of Indiana's proposed placement of the three-sided monument amidst twelve other secular symbols of the nation's legal and cultural history fails to similarly convey a secular message. I do not understand why the majority reasons that but four lines on the monument (those four Commandments that reference God) so overshadow the remainder of the monument (which includes the Bill of Rights and the Preamble to the Indiana Constitution) such that the majority concludes the monument has no secular purpose whatsoever.

Here, the State of Indiana has architecturally blended the text of the Ten Commandments with two other important legal texts—the United States Bill of Rights and the Preamble to the Indiana Constitution (not to mention the twelve other secular monuments with which it would share the Statehouse lawn). The explicit language of the Preamble further reflects the secular message of the monument. The Preamble to the Indiana constitution states three goals: 1) for "*justice [to] be established*"; 2) for "*public order [to be] maintained*"; and 3) for "*liberty [to be] perpetuated*". The three goals espoused by the Preamble, reinforced by the freedoms contained in the Bill of Rights, clearly serve to

secularize the monument, memorializing the cornerstones of our civilization's law.

The majority somehow suggests that the design and construction of the monument belies any intention to convey a secular message. Respectfully, I am forced to disagree. It seems to me that the majority is overly concerned with the design of the monument. This court, nor any other court, should not be in the business of monument design. If the State of Indiana believes that it is aesthetically pleasing (or more conducive to conveying a historical message) to erect the monument as designed, it should be permitted to do so without the court making the assumption based only on a foundation of quicksand that a reasonable observer will glance only at a single side or glance only at the side bearing the larger letters. I believe that a court's inquiry should focus on the reasonable observer *viewing the display in its entirety*, and not on an observer's potential misperception of an isolated aspect of the display. When any person focuses on only one particular aspect of a monument or display to the exclusion of the other aspects it will distort even the most reasonable observer's opinion. It seems far more reasonable to assume that a person taking the time to gaze upon the beautiful edifice will look at all three sides, and draw conclusions from the whole—which presents three important steps in the development of the law as they affect 1) the people of the world; 2) the citizens of the United States; and 3) the citizens of the State of Indiana.

Further, because the Preamble to the Indiana Constitution would occupy the smaller side of the monument between the Ten Commandments and the Bill of Rights, its message, "*that justice be established, public order maintained, and liberty perpetuated*," would *link* the Ten Commandments with the Bill of Rights and *convey* a secular message of the fundamental legal principles which form the basis of our national history and culture.

Indiana Governor O'Bannon explicitly articulated the secular purpose of the monument, stating that it was to be "an integral part of the Statehouse setting, which honors the history of our state and our nation." The Governor's March 14, 2000, press release further stated that the Ten Commandments "stood on the Statehouse lawn as a reminder of some of our nation's core values . . . [and that] [s]oon those words will stand alongside the abiding principals of our form of government, especially its protections of individual rights. They're ideals we all need to be reminded of from time to time."

We are "normally deferential" to "articulation[s] of secular purpose," so long as they are "sincere and not a sham." *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987). "This is in keeping with the well settled maxim that courts are 'reluctan[t] to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned. . . .'" *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993) (quoting *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983)).

The majority attempts to downplay Governor O'Bannon's press release, stating that reminding society of its "core values" is akin to the purpose of providing a "code of conduct" rejected in *Books*. But this is not the same case as *Books*, and "[e]very government practice must be judged in its unique circumstances. . . ." *Allegheny*, 492 U.S. at 595. In *Books*, the *only* text set forth on the single monument at issue was that of the Ten Commandments. In the factual situation before us, the Ten Commandments stands joined with the Bill of Rights and the Preamble to the Indiana Constitution, thus linking the three texts and conveying a secular message regarding our nation's legal history. The Governor's well-reasoned message in his press release cannot and should not be construed as shallow words without meaning or sincerity.

Nevertheless, the majority here, partially based on the recent decision in *Books*, 235 F.3d at 303-04, seems to go out of its way to second guess Governor O'Bannon's stated purpose for the proposed monument in an attempt to discredit that purpose. The Governor (and also the Elkhart City Council, in *Books*) should be presumed to have fulfilled the duties of his office with honesty and integrity. There is not one iota of evidence of *insincerity* here, and in my opinion no justification for the majority's refusal to give credit to the state's articulated purpose. *See, e.g., American Jewish Congress v. City of Chicago*, 827 F.2d 120, 127 (7th Cir. 1987) (relying on affidavit from mayor's chief of staff stating secular reasons to attract visitors to downtown businesses and to take official note of Christmas to find a secular reason behind a nativity display and noting "the absence of any evidence that the city's stated purposes behind the display of the nativity scene are merely a sham"); *Bridenbaugh*, 185 F.3d at 799 (relying on testimony offered during litigation as to Indiana's purpose for giving employees a Good Friday holiday).

I believe that the proposed monument conveys a secular message that honors and pays due homage to our nation's legal history. Accordingly, I would hold that the monument satisfies the first prong of the Lemon test requiring a valid secular purpose.

B. Principal or Primary Effect

The second prong of Lemon focuses on whether the government's practice has the principal or primary effect of advancing or inhibiting religion. *Freedom From Religion Foundation, Inc, v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). Under this prong we ask only in the case before us whether an "objective observer" would perceive the display as a state endorsement of religion. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). The

appropriate inquiry is thus, whether a citizen knowing the totality of the facts and circumstances surrounding the placement of the proposed monument would believe that the State of Indiana and its officials seek to endorse, rather than merely respect and tolerate, religion by placing it on the Statehouse lawn. *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring). "A policy which *tolerates* religion, [however], does not improperly *endorse* it." *Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) (emphasis in original).

Even recent decisions of the Supreme Court have looked favorably upon the constitutionality of government displays of purely religious symbols—a creche and menorah—when those symbols were part of a larger display, as in the factual situation before us. *See Lynch*, 465 U.S. at 686; *Allegheny*, 492 U.S. at 617-18; *see also Books*, 235 F.3d at 316-18 (Manion, J., dissenting) (discussing *Lynch* and *Allegheny*). The Court's guidance appears to be that where the religious display—the creche in *Allegheny*—stood alone, it violated the Establishment Clause. *Allegheny*, 492 U.S. at 598-99.

As *Lynch and Allegheny* teach, the inquiry into whether the display of a religious symbol violates the Establishment Clause turns upon the context in which the symbol appears. In this case, the Ten Commandments is not the only text to be inscribed on the monument, but instead is only one portion of the display, to be accompanied the Bill of Rights and the Preamble to the State of Indiana's Constitution.

The majority curiously suggests, however, that an observer who views the entire display may reasonably believe that it links religion and law since the Bill of Rights and the Preamble are near the Commandments. The cases the majority cites for this proposition are distinguishable. In *Books*, 235 F.3d 292, and *Harris v. City of Zion*, 927 F.3d 1401 (7th Cir. 1999), the religious symbol was directly

linked to a governmental symbol—an American Eagle gripping the national colors atop a plaque inscribed with the Ten Commandments and a Latin cross surrounded by other symbols of city life on a municipality's corporate seal. Here the monument does not join government symbols (such as the American Eagle or a municipality's seal) with religious symbols or text.

Moreover, the layout of monuments that adorn the Statehouse lawn also serves to diminish any perceived endorsement of religion that may allegedly flow from the monument at issue. The proposed monument would share the Statehouse lawn with twelve other monuments—all wholly secular in nature, thereby emphasizing the secular aspects not only of the proposed monument but of the entire designated area. For instance, among the twelve other monuments are busts and statues of historic figures—Christopher Columbus, George Washington, and Robert Dale Owen. There are statues of former Indiana Governors Thomas A. Hindricks and Oliver H.P. Morton. There are monuments commemorating historic events and ideals of liberty—two Civil War friezes and two monuments dedicated to the National Road. There is also a statue of a coal miner to honor Indiana's coal mining history and a marker honoring the Statehouse itself. In short the Statehouse lawn is an area dedicated to monuments that pay due homage to both the state's and the nation's history that serves to situate the monument in an appropriate *cultural* and *historical* context.

As the Supreme Court clearly noted in *Lynch*, in applying the second prong of the Lemon test a court should not focus exclusively on the religious symbol, but within the context in which the symbol appears. *Lynch*, 465 U.S. at 680. In *Lynch*, the Court allowed the city of Pawtucket, Rhode Island to erect a holiday display that included a creche depicting the nativity scene where that creche was

surrounded with other secular symbols, such as reindeer, Santa Claus, candy-striped poles, teddy bears, among others. *Lynch*, 465 U.S. at 671. Here, the context of the proposed monument, placed amongst the twelve other secular markers honoring Indiana's and the nation's history, only serves to reinforce the secular nature of the monument in question as set forth and clearly delineated in Governor O'Bannon's press release. The twelve secular monuments that would share the Statehouse lawn with the proposed monument create a *museum-like setting* that effectively and persuasively does away with any conceivable endorsement of religion that would flow from the proposed monument.

The majority suggests that the other monuments would be too far away to contribute to the secular message of the proposed monument. I fail to see what effect the distance between the monuments upon the very beautiful plot of land has upon our analysis. Indeed the proposed monument is not given a special place on the Statehouse lawn any more than any of the other memorial edifices. Instead, it would be merely just one of a number (12) of monuments on the lawn. In my view, the vastness of the grounds, coupled with the number and diversity of the subject matter of the monuments, *dilutes* even the slightest perceived endorsement of religion flowing from the proposed monument. Accordingly, I conclude that the proposed monument does not constitute an endorsement of religion. Because it also satisfies and fits within the parameters of the other prongs of *Lemon*, I would further hold that it does not violate the Establishment Clause.

II. Historical Practices

Even if the proposed monument was found not to satisfy the requirements of *Lemon*, which I am convinced it does, I still would dissent form the majority's opinion. Where a religious symbol has a landmark foundation and meaning in

the history of our country the Supreme Court has sidestepped the strictures of *Lemon* to avoid a result contrary to the clear intent of the Framers of the Constitution. Then-Justice Rehnquist discussed at length the history and intent of the Framers who crafted the First Amendment in *Wallace*, 472 U.S. at 95-114 (Rehnquist, J., dissenting). I share in the view that the First Amendment was never intended to be read in a wholly secular fashion, as if its objective were to remove all religious expression from the public square and to prefer irreligion over religion.

Our Nation's history is replete with religious symbols "linked" in some way to the government. Indeed, George Washington, at the request of the Congress that passed the Bill of Rights, proclaimed, Thanksgiving to be a day of "*prayer to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.*" *See id.*, 472 U.S. at 113. Washington further declared Thanksgiving "to be devoted by the people of these states *to the service of that great and glorious Being* who is the beneficial author of all the good that was, that is, or that will be . . . [and] that we may *all unite in rendering unto Him our sincere and humble thanks* for his kind care and protection of the people of this country . . . and, in general, *for all the great and various favors which He has been pleased to confer upon us . . . and beseech Him to pardon our national and other transgressions . . . to promote the knowledge and practice of true religion and virtue . . . and to grant all mankind a degree of temporal prosperity as He alone knows best.*" George Washington, Proclamation: A National Thanksgiving (reprinted in 5 Founders' Constitution 94). Similarly, Thomas Jefferson signed treaties with Indian tribes that provided annual cash support in order for a Roman Catholic priest to provide services for the tribes. *Wallace*, 472 U.S. at 103.

Washington's and Jefferson's examples have been followed as the practice of Congressional prayer has continued uninterrupted since the very first Congress. Moreover, each Congress elects (and pays a salary to) a Chaplain to preside over this practice. *See Marsh v. Chambers*, 463 U.S. 783, 788-89 & n.10 (1982). The Supreme Court (and this court) open their sessions with an declaration that states "God save the United States and this Honorable Court." *Marsh*, 463 U.S. at 786; *Zorach v. Clausen*, 343 U.S. 306, 312-13 (1952). Numerous other governmental practices pay homage to our religious heritage, including national holidays such as Christmas and Thanksgiving, military chaplains, the motto, and the Pledge of Allegiance. *See Lynch*, 465 U.S. at 674-75. Our currency bears the motto "In God We Trust." "Because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs," *id.* at 693, but instead as part of the richness of the very fabric of our Judeo-Christian heritage which comprises an integral part of our Nation's history and culture.[2]

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[2] Indeed, if one extends plaintiffs' theory of the case to its logical extreme, not only must every public monument be shorn of religious reference, but many of the nation's most revered documents must be cleansed as well. If the Ten Commandments are deemed constitutionally offensive, how can one justify the rich religious traditions of our nation established in government practices including the opening of a Congressional session or the opening of this court with a prayer; similarly, how can one justify the religious references as found in innumerable public documents, including the Declaration of Independence (which declares God as the source of our rights) or the Constitutions to 46 out of the 50 states (which include references to "God," "Almighty God," and the "Supreme Ruler of the Universe," and with notable frequency refer to God as the author or source of human rights and liberties). A policy that tolerates religion does not improperly endorse it. *See Chandler*, 230 F.3d at 1317 (writing about the intersection of the Establishment Clause and Free Exercise Clause).

The proposed monument's reference to the Ten Commandments is much like other references (that have been deemed not to violate the Constitution) to God as set forth in the Christian history of our country—not an endorsement of religion, but merely an acknowledgment of the historical fact that the Ten Commandments served as an integral part of the foundation for our country's legal system. Because of the Ten Commandments' history and ubiquity, I believe that even if the monument would somehow fail the strictures of *Lemon*, Indiana's proposed monument as determined herein does not violate the Establishment Clause.

III. Conclusion

The majority's decision, similar to that in *Books*, 235 F.3d 292, leads us further away from the mainstream—and to a point where irreligion is favored over religion. The Constitution does not require complete separation of church and state, but instead "*it affirmatively mandates accommodation, not merely tolerance, and forbids hostility toward any*," *Lynch*, 465 U.S. at 673, and the appropriate question to ask is whether an "objective" observer would believe that the display constitutes a government endorsement of religion, *Santa Fe. Indep. Sch. Dist.*, 120 S.Ct. at 2278. After all, "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach*, 343 U.S. at 313.

In my view, the proposed three-subject monument inscribed with the Ten Commandments, the Bill of Rights, and the Preamble to the Indiana Constitution, does not offend the Constitution. Instead, it serves as a well-deserved recognition of our country's legal, historical, and religious roots. Any possible endorsement of religion is diluted by the monument's placement on the Statehouse lawn with at least twelve other secular monuments memorializing and honoring the state's and nation's history.

Samuel Smith wrote *My Country, 'Tis of Thee* in 1831 and concluded his epic with the following lines:

> Our fathers' God, to thee, Author of liberty, To thee we sing;
> Long may our land be bright, With freedom's holy light.
> Protect us by thy might, Great God, our King!

Does Samuel Smith's song no longer represent the very values upon which this country was founded, and indeed, where government officials are forbidden to sing of the liberty about which Smith cherished above all else, simply because it refers to religion?

I therefore respectfully DISSENT from the court's holding that Indiana's proposed monument violates the Establishment Clause or constitutes an establishment of religion, and thus would REVERSE the district court's grant of the preliminary injunction.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA CIVIL LIBERTIES UNION, INC., et al., Plaintiffs,	)	
vs.	)	IP 00-0911[*sic;* 0811] -C-B/S
FRANK O'BANNON, et al., Defendants.	)	

ORDER GRANTING PRELIMINARY INJUNCTION

Plaintiffs, Indiana Civil Liberties Union, Inc., et al. (collectively "ICLU"), move for a preliminary injunction seeking to prevent Defendants, Frank O'Bannon, et al. (collectively "Indiana" or "State"), from posting on the grounds of the Indiana Statehouse a monument containing, among other things, the Ten Commandments. For the reasons discussed below, we GRANT Plaintiffs' motion and preliminarily enjoin the State from proceeding to erect the proposed monument on the grounds of the Indiana Statehouse.

Background

The parties have entered a Stipulation of Facts ("Stip.") from which the majority of the following facts are gleaned. To the extent that we rely on one of the parties' other submissions, we abbreviate them as follows: Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction ("ICLU Mem."); Defendants' Memorandum in

Opposition to Motion for Preliminary Injunction ("Opp'n Mem."); and Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction ("ICLU Reply").

A. The Statehouse Grounds

The Indiana Statehouse is prominently positioned in downtown Indianapolis consisting of, in addition to the Capitol Building itself, a sizeable expanse of land stretching from Washington Street on the south, between Capitol and Senate Avenues, to Ohio Street on the north. See Stip. ¶ 3. The Statehouse contains the office of the Governor, the Indiana General Assembly, the Indiana Supreme Court and the chambers of its justices, the Indiana Court of Appeals and the chambers of some of its judges, as well as the offices of certain other Indiana constitutional and statutory officeholders. See id. ¶ 2. Immediately to the north of Washington Street is a 1.93 acre plot of park-like land on the grounds of the Statehouse, immediately in front of the south entrance to the Statehouse. See id. ¶ 4.

On the park-like lawn area, there are presently located, among other things: monuments honoring the national road and coal miners, as well as statues of George Washington, Christopher Columbus, Vice President Thomas A. Hendricks, and Governor Oliver P. Morton; in addition there are a number of ornamental trees marked with placards honoring various former governors of Indiana. See Stip., Ex. 2 ("Map") (map of all of the monuments on the statehouse grounds including their photographs). The southwest area of the lawn contains currently only a single tree marked with a placard honoring former Governor Schricker and a four-feet tall by two-feet wide monument noting the historic significance of the National Road, US 40, which formerly ran along Washington Street. See id. ¶ 5. The proposed monument ("Monument") containing a version of the Ten Commandments, the Preamble of the 1851 Indiana

Constitution, and the Bill of Rights is intended to be placed on this southwest section of the lawn, near Senate avenue, though the precise spot has not been identified to us by the parties. See Stip. ¶ 28. The Monument as designed will be a four-sided structure, measuring approximately seven feet high at its highest point, six-feet, seven-inches wide at its widest point, more than four-feet deep, and will be composed of two large blocks of Indiana limestone weighing almost 11,500 pounds. See id. ¶¶ 7, 10.

It is intended that the Monument will be erected in the approximate location of a former monument containing the Ten Commandments that, in 1958, had been donated by the Fraternal Order of the Eagles ("FOE") in 1958. See id. ¶¶ 24, 28. The prior Ten Commandments monument was toppled in 1991 in a series of acts of vandalism. See Stip. ¶¶ 24, 26; Stip., Ex. 1 ("Press Release"). Its exact location, and which direction it will face, are yet to be determined; however, the State indicated at oral argument that the Monument will be placed as closely as possible to the site of the former Ten Commandments monument. See Stip. ¶¶ 24, 28. The site of the former monument is within the triangular portion of grass shown on the Map as containing the tree dedicated to former Governor Schricker, approximately one-hundred-thirteen-feet north of the north edge of the Washington Street sidewalk, approximately eighty-three-feet south of the middle of the east-west walkway that touches the south side of the Statehouse, and approximately nineteen-feet east of the Senate Avenue sidewalk. See id. ¶¶ 34, 35. The location is also approximately forty-one-feet away from Governor Schricker's tree and ninety-two-feet away from the National Historic Civil Engineering Landmark. See id. ¶ 36. The monument honoring Christopher Columbus is approximately forty-three-feet north of the east-west sidewalk that touches the south side of the Statehouse. See id. ¶ 37. The State also represented at oral argument that the

Monument will be at least fifteen-feet from any existing pathway and that no plans exist to create a path to it.

South of the Statehouse, five monuments and four dedicated trees currently stand; located west of the Statehouse are three monuments, one marker, and two dedicated trees. See Map.[1] To reiterate, only the Columbus statue, one of the National Road monuments, and a dedicated tree will be within ninety-two-feet of the proposed site of the Monument. See Stip. ¶¶ 35-37.

B. The Monument

The proposed Monument is being donated by the Indiana Limestone Institute, after having been enlisted by State Representative Brent Steele of Lawrence County ("State Representative Steele"). See Stip. ¶¶ 21-22; Opp'n Mem. at 4 (citing Deposition of Brent Steele ("Steele Dep.") at 8-10).

The State's brief details the history of the 1958 monument, given as a gift to the State by the FOE. See Opp'n Mem. at 2-4; Stip. ¶ 25.[2] The original monument contained the text of the Ten Commandments on a seven-feet tall, three-feet wide, and one-foot deep center tablet that was flanked by two smaller tablets (each of which was three-feet by three-feet, eight-inches) listing Indiana FOE lodge affiliates. See Opp'n Mem. at 2-3. The original monument was erected as part of a national campaign, initiated by a Minnesota juvenile court judge, as a way of addressing what he perceived to be a need for juveniles to have a "code of

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[1]As the parties have provided a map of the Statehouse grounds and pictures of the monument, see Map, we will refer to those materials to the extent such reference is required rather than describing the monuments in detail herein.

[2]As we note elsewhere, we have reservations about the relevance of this information, but include it to provide a complete record.

conduct," from which they could benefit by "'exposure to one of mankind's earliest codes of conduct, the Ten Commandments.'" See Opp'n Mem. at 3 (quoting Books v. City of Elkhart, 79 F. Supp. 2d 979, 982 (N.D. Ind. 1999), appeal pending and Colorado v. Freedom from Religion Found., Inc., 898 P.2d 1013, 1017 (Colo. 1995)).[3] The FOE undertook a national campaign at or about this time in support of this program. See id.

In 1991, when the previous monument was vandalized, Indiana officials promised the public it would replace the monument. See id. at 3-4; Stip. ¶ 26. In 1996, Indiana officials renewed their promise to replace the FOE monument; however, in the interim the original monument had been repaired and relocated to the Eagles Lodge in Anderson, Indiana. See Steele Dep. at 7, 12. When plans were announced to construct a new Ten Commandments monument on Statehouse grounds, Representative Steele oversaw completion of the initial design in conjunction with the Indiana Limestone Institute. See id. at 6-9; Stip. ¶ 22. This design called for a more substantial monument, hopefully more impervious to vandalism, containing only a text of the Ten Commandments. See Opp'n Mem. at 4; ICLU Reply at 2. However, after being apprised of the ruling in Colorado v. Freedom from Religion Foundation, Inc., Representative Steele (who is an attorney) decided to add two other historical documents to the monument,

[3]The constitutionality of an identical monument was at issue in the Northern District of Indiana in Books, as well as in Colorado v. Freedom from Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995). The Government has cited facts from these two cases to supplement its presentation of historical facts here.

namely, the Bill of Rights and the Preamble to the 1851 Indiana Constitution. See Steele Dep. at 5, 17, 27-34.[4]

The Monument as designed consists of two pieces, a base and an upper portion, weighing approximately 11,500 pounds total. See Stip. ¶ 7. The base is a rectangular block of limestone, six-feet, seven-inches wide, four-feet, seven-inches deep, and two-feet, eight-inches long. See id. ¶ 8. On top of the base will sit a four-sided block -- tapered, with two large faces, each measuring four-feet, four-inches in height by three-feet, seven-inches in width, while the smaller faces will be triangular, also four-feet, four-inches tall, but tapering from a width of approximately two-feet, six-inches at the base to six-inches at the top. See id. ¶ 9.

The large surfaces on the top block will be tablet shaped, that is, the stones will be carved with two rounded arcs or arches at the top; (it is a form widely utilized in artistic depictions of the stone tablets delivered or handed down by Moses upon his return from Mt. Sinai). One of the surfaces will display the following text:

TEN COMMANDMENTS

I. THOU SHALT HAVE NO OTHER GODS BEFORE ME

II. THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE

III. THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN

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[4]The Press Release erroneously indicated that the monument would include the Preamble to the United States Constitution rather than the Preamble to the 1851 Indiana Constitution. See Press Release.

IV. REMEMBER THE SABBATH DAY TO KEEP IT HOLY

V. HONOR THY FATHER AND THY MOTHER THAT THY DAYS MAY BE LONG IN THE LAND WHICH THE LORD THY GOD GIVETH THEE

VI. THOU SHALT NOT KILL

VII. THOU SHALT NOT COMMIT ADULTERY

VIII. THOU SHALL NOT STEAL

IX. THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR

X. THOU SHALT NOT COVET THY NEIGHBOR'S HOUSE OR WIFE OR ANYTHING THAT IS THY NEIGHBOR'S

Id. ¶¶ 9-11. The State represents that this text, which is allegedly similar to that appearing on the 1958 FOE-donated monument, will be set forth in all-capital letters approximately one-inch in height. See id. ¶ 13. This is the only text appearing on one side of the monument. See id. ¶ 12. The second large tablet-shaped face of the Monument will display the text of the Bill of Rights from the United States Constitution which is expected to be engraved all in capital letters each of an approximate height of five-eighths of an inch. See id. ¶¶ 14-16.

On one triangular face of the Monument will be the text of the Preamble to the 1851 Indiana Constitution --

> To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People

> of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

Id. ¶ 19. However, the source of this text is not expressly attributed to the Indiana Constitution. See id. The other triangular face will identify the Indiana Limestone industry as the donor of the monument with the historical explanation that "[t]his monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of Eagles on October 25, 1958." Id. ¶ 17. We are not informed of the size of the lettering of these two passages, but the State expects it to be balanced in the context of the rest of the monument. See id. ¶¶ 18, 20.

The purpose for erecting this monument was explained by Governor O'Bannon in a press release issued at the time he announced the State's acceptance of this gift. The Governor stated that the monument will be placed on the Statehouse lawn to remind people of "some of our nation's core values" and the juxtaposition of the Ten Commandments and the Indiana Constitution's preamble as well as the Bill of Rights will exemplify "ideals" that all people "need to be reminded of from time to time." Governor O'Bannon also stated in that press release that the Ten Commandments "[s]oon ... will stand alongside the abiding principles of our form of government, especially its protections of individual rights, ..., " and "will be an integral part of the Statehouse setting, which honors the history of our state and our nation." The parties do not disagree that the new monument is also intended to honor the FOE for having donated the old monument in 1958 that contained the Ten Commandments and stood on the Statehouse lawn. See Stip. ¶ 17.

State Representative Steele, who co-authored Act 1180 authorizing the display of the Ten Commandments along

with these other two documents, stated in the press release that the "new monument will soon take its proper place alongside such historic figures as Oliver P. Morton, Thomas A. Hendricks, George Washington, and Christopher Columbus." When questioned as to why he chose the Ten Commandments to display on the Statehouse grounds, as opposed to any other codes, such as the Code of Hammurabi and the Roman Code, Representative Steele responded, "[W]hy not these rules?" Steele Dep. at 39. Representative Steele shares Governor O'Bannon's view that the Ten Commandments remind us of the nation's core values and that the Ten Commandments and the other texts to be displayed on the Monument express common ideals. See Steele Dep. at 34, 36-37. Representative Steele has conceded that certain of the statements in the Ten Commandments, such as the admonishments to not have other gods, keep the Sabbath holy, and not make graven images, in addition to expressing core values in our nation, are a form of religious expression. See id. at 36, 37.

C. The Plaintiffs

For purposes of injunctive relief, Defendants do not challenge Plaintiffs' standing. The ICLU has among its membership employees of the State of Indiana who work in the State Office Building which is located immediately west of the proposed location of the monument. See Compl. The ICLU asserts that because of this proximity these individuals will be forced into frequent, direct, and unwelcome contact with the monument during the course of their normal routines, it if is erected as planned, and to alter those routines to avoid the monument would impose an undue burden. See id. Further, members of the ICLU as well as the individual plaintiffs allege that they travel regularly to the Statehouse to participate as citizens of Indiana in various capacities and for a variety of purposes. See id. Plaintiffs allege that they will be forced to come into direct and unwelcome contact with

the monument, if it is erected as planned, and to avoid the monument would cause them an undue burden. See id. Finally, Plaintiffs allege that some of the ICLU's members, as well as individual plaintiffs, regularly travel on the road and sidewalks adjoining Washington Street, near where the monument is to be located which would force them to come into direct and unwelcome contact with the monument, if it is erected as planned, and again to avoid the monument would cause them an undue burden. See id.

Discussion[5]

A. Preliminary Injunction Standard

In order to be entitled to a preliminary injunction, the moving party must demonstrate:

> (1) some likelihood of prevailing on the merits, and (2) an inadequate remedy at law and irreparable harm if preliminary relief is denied. If the movant clears these two thresholds, the court must consider (3) the irreparable harm the nonmovant will suffer if preliminary relief is granted, balanced against the irreparable harm to the movant if relief is denied; and (4) the public interest, meaning the effect that granting or denying the injunction will have on nonparties.

Grossbaum v. Indianapolis-Marion County Bldg. Auth., 63 F.3d 581, 585 (7th Cir. 1995); see also Baja Contractors, Inc. v. City of Chicago, 830 F.2d 667, 675 (7th Cir. 1987). The heart of this test is "a comparison of the likelihood, and the gravity of two types of error: erroneously granting a

[5]Although in its Answer the State has contested Plaintiffs' standing to bring suit, it has conceded standing for the purposes of this motion; thus, we do not address here the legal merits of that issue.

preliminary injunction, and erroneously denying it." General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588, 590 (7th Cir. 1984). Defendants concede for the purposes of this motion that Plaintiffs lack an adequate remedy at law. See Opp'n Mem. at 14.

1. Likelihood of success on the merits: Establishment Clause standards[6]

Plaintiffs' first obligation is to establish some likelihood of success on the merits of its challenge to the Monument on First Amendment-Establishment Clause grounds. This is no small assignment, given the profusion and confusion reflected in the case law and in Supreme Court precedent. As Judge Sharp noted in his recent decision in Books, there are no fewer than five Supreme Court tests for determining when government action penetrates the wall between church and state. See Books, 79 F. Supp. 2d at 989 & n.5. However, since both parties in the case at bar agree that the substantive law standards governing this case are those set out in Lemon v. Kurtzman, 403 U.S. 602 (1971), we need not and will not engage in a full-scale analysis of each possible test. See ICLU Mem. at 4-6; Opp'n Mem. at 14-15. Our approach is validated by recent reaffirmations, by both the Supreme Court and the Seventh Circuit, of the continuing vitality of the Lemon standards. See Agostini v. Felton, 521 U.S. 203, 222-23 (1997); Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 493 (7th Cir. 2000); Bridenbaugh v. O'Brannon, 185 F.3d 796, 797-98 (7th Cir. 1999).[7]

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[6]The ICLU has framed its challenge to the posting of the Ten Commandments in violation of the Establishment Clause, not to the constitutionality of Indiana Code § 4-20.5-21-2 which allows for the posting of the Ten Commandments. See ICLU Mem. at 4.

[7]At oral argument, both parties conceded that the anticipated Seventh Circuit's decision reflecting its review of Books, which case was argued there in May of this year, will be highly informative on the issues

Under Lemon, a governmental action is constitutional under the Establishment Clause if: (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster excessive governmental entanglement with religion. See Lemon, 403 U.S. at 611-12. A governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." Edwards v. Aguillard, 482 U.S. 578, 583 (1987) (emphasis added). Although the continuing vitality of the Lemon test has been debated among jurists and other legal scholars, the Supreme Court recently reaffirmed that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed ...." Agostini, 521 U.S. at 222-23. Thus, Establishment Clause analysis continues to focus on "whether the government acted with the purpose of advancing or inhibiting religion ... [and] whether the [action] has the 'effect' of advancing or inhibiting religion [as well as whether the action involves an excessive entanglement with religion]." Agostini, 521 U.S. at 232.

The general principles laid out in Lemon, have been redefined by the Supreme Court so that under current interpretations the first two factors are characterized or construed as an "endorsement" test. See, e.g., Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989). As the Seventh Circuit recently noted,

> [f]ollowing the Court's formal acceptance in County of Allegheny ..., the effect prong of [the Lemon] test has been analyzed under the 'perception of endorsement' test developed in

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the parties have presented to us, and perhaps, depending on the scope of that opinion, even dispositive of this matter.

> Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring). Under this test, 'the effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.'

City of Marshfield, 203 F.3d at 493.

The ICLU concedes that the proposed Monument does not implicate the third prong of the Lemon test, that is, it does not promote "excessive entanglement" of the government with religion; thus we only consider whether the Monument has a secular purpose and whether the effect of the Monument is to advance or inhibit religion.

a. Purpose for creating the Monument

The general rule when attempting to determine the purpose behind a governmental action is to consult and to defer to the stated purpose for the action. See Edwards, 482 U.S. at 586-87. While the secular purpose need not be the exclusive purpose for taking the action, it must be sincere and not a sham to avoid a potential Establishment Clause violation. See Bridenbaugh, 185 F.3d at 800, 801 (citing Lynch, 465 U.S. at 681 n.4 and Edwards, 482 U.S. at 586-87). Since the avowed purpose may not be a "sham," courts have looked at both the context of the display as well as the content of the display to determine if the purpose is in fact secular. See County of Allegheny, 492 U.S. at 597.

In conducting this analysis, we, of course, examine first the applicable precedential law. In Stone v. Graham, the Supreme Court held that Kentucky legislation requiring the posting of the Ten Commandments in the back of every classroom in the commonwealth was unconstitutional because it had no valid secular purpose. 449 U.S. 39, 42-43

(1980). The displays recited in small print at the bottom the following: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Id. at 41. The Supreme Court held that, despite this avowed purpose, the purpose was plainly religious in nature. See id. In reaching this conclusion, the Court relied on the fact that the Ten Commandments is "undeniably a sacred text in the Jewish and Christian faiths ...." Id. The Court indicated that other governmental invocations of the Ten Commandments may pass constitutional muster, but the challenged action made no attempt to mitigate the religious nature of the Ten Commandments. See id. at 42 ("This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. ... Posting of religious texts on the wall serves no such educational function.") (citation omitted).[8]

Likewise, in a trio of related cases, the Eastern District of Kentucky has recently held that the display of the Ten Commandments on public grounds had no secular purpose and was unconstitutional. See Doe v. Harlan County Sch. Dist., 96 F. Supp. 2d 667 (E.D. Ky. 2000) (posting in public schools); American Civil Liberties Union of Ky. v. McCreary County, 96 F. Supp. 2d 679 (E.D. Ky. 2000) (posting in courthouse); American Civil Liberties Union of Ky. v. Pulaski County, 96 F. Supp. 2d 691 (E.D. Ky. 2000) (posting in courthouse). In these cases, the defendants

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[8]In fact, as we discuss below, Justice Stevens has noted that the south wall of the Supreme Court chambers contains a frieze that includes a depiction of Moses holding the Ten Commandments that presents no constitutional violation. See County of Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part).

claimed that the displays were intended to teach "American religious history and the foundations of the modern state." McCreary County, 96 F. Supp. 2d at 686. However, the "narrow scope of the display[s]" belied this stated purpose. See id. at 686-87. Moreover, the history of the displays revealed that they originally contained only the Ten Commandments and that only in the face of litigation did the defendants attempted to flank the Commandments with other documents. See id. at 687. The Court stated that even if it were to consider these additional documents in construing the purpose of the display, the fact that each had been chosen for its religious references reinforced the court's conclusion that there was no secular purpose. See id.

In Ring v. Grand Forks Public School District Number 1, the District of North Dakota faced a similar challenge to legislative action requiring the posting of a placard containing the Ten Commandments in a conspicuous place in every classroom in the state. See 483 F. Supp. 272, 273 (D.N.D. 1980). These defendants contended that the purpose of the requirement was to "instill in students the basic mores of civilization and the principles of our common law." Id. at 274. However, the court held that the posting of the Ten Commandments without any explanation plainly failed to convey that message and thus had no secular purpose. See id.

In contrast to these holdings, the Northern District of Indiana recently determined that a monument on the municipal building lawn in the City of Elkhart, Indiana, which structure was identical to the one that formerly stood on the Indiana Statehouse lawn, had a secular purpose. See Books, 79 F. Supp. 2d at 996. The District Court judge could glean almost no evidence as to the intent of the city in accepting the display of the Ten Commandments, so it looked to the purpose behind the donation of the monument. See id. at 996. Looking only at this stated purpose and

referring to the factual findings of the Colorado Supreme court in Colorado v. Freedom From Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995), where the intent of an identical donor of an identical monument was construed, the District Judge in Books held that the purpose was to "promot[e] morality among [the city's] youth, ... a legitimate aim of government and traditionally part of the police powers of the state." Books, 79 F. Supp. 2d at 996. In addition, the District Court noted that the donor, the Elkhart chapter of the FOE, was a service organization, not a religious organization. See id. at 982. Moreover, at the time of the litigation, the Elkhart Common Council had stated its intention "to maintain a number of exhibits on City property of cultural and historical significance, of which the Ten Commandments monument is just one." Id. at 996. Thus, in Books, the court concluded that the city had a secular purpose in originally accepting the monument and that its presently stated purpose in displaying it was also secular in nature. See id.

In a similar fashion, the Western District of North Carolina held that a display of the Ten Commandments in conjunction with the image of Lady Justice, the sword of justice, and the scales of justice flanked by the United States and North Carolina flags had a secular purpose and was constitutional. See Suhre v. Haywood County, 55 F. Supp. 2d 384, 399 (W.D.N.C. 1999). The court looked to the history of the dedication of the monument and found that its intent was to "honor and respect the development of the judicial system." Id. at 394. Although the dedication ceremony included the admonition that "[t]his is your Temple of Justice .... Bear in mind at all times that you should be as fair in your dealings with each other as the blind Goddess who stands there, always guided by the Ten Commandments as your code of law ...," id. at 387, the court held that the purpose was secular in nature. See id. at 394.

Turning to the case at bar, we start with the Supreme Court's declaration that the Ten Commandments is undeniably a sacred text. See Stone, 449 U.S. at 41.[9] With the unambiguous religious nature of the Ten Commandments as our starting point, the State is obligated to articulate a valid secular purpose for the display of this scared text. See Metzl v. Leininger, 57 F.3d 618, 622 (7th Cir. 1995). The State adopts the purpose articulated by the Governor in his Press Release announcing that the State will allow the Monument to be placed on the Statehouse lawn, which states that the Ten Commandments are to be displayed as a reminder of our nation's core values and ideals. See Press Release. Further, the purpose of the Monument is to "venerate[] important documents that reflect the history and ideals animating American government ... [and] add[] to the rich historical context presented to visitors to the State capitol." Opp'n Mem. at 15. Focusing on the documents other than the Ten Commandments contained on the Monument, the government argues that the content of the Monument is predominately secular. See id. at 16. "Most of the surface of the monument and most of the words on it relate to the Bill of Rights and Preamble to the 1851 Indiana Constitution." Id.

However, at oral argument, the State was unable to elucidate or cite any historical link between most of the commandments and "ideals animating American government." Counsel for the State, when asked about each individual commandment, was unable to provide any

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[9]According to the ICLU, the sacred nature of this text stems from the belief that the Ten Commandments were given by God to Moses at Mount Sinai. See ICLU Mem. at 3. Moreover, many people see the Commandments not as individual statements, but instead as a whole -- a single pronouncement held together by the initial commandment, "I am the Lord thy God." See ICLU Mem. at 3; Affidavit of Robert Gianninni.

historical linkage between seven of the commandments and only weak historical links to three of them.[10]

The State directs us to the factual findings in Colorado v. Freedom From Religion Foundation as indicative of the secular purpose inherent in a display posting the Ten Commandments. There, the stated purpose was to "show ... youngsters that there were such recognized codes of behavior [as the Ten Commandments] to guide and help them." Freedom From Religion Found., 898 P.2d at 1024 n.16. One of the witnesses testifying on behalf of Colorado opined that it was possible to construe commandments two through ten as being examples of law that this country has observed from its very beginnings. See id. at 1024 n.17.

We are unpersuaded by the Colorado Supreme Court's factual findings. On the one hand, the stated purpose in that case, as well as in Books, for that matter, to wit, "to provide a code of conduct for youngsters," is quite different than Indiana's stated purpose in this case to "provide a reminder of our nation's core values and ideals." Although we withhold our view as to whether the purpose stated in Freedom From Religion Foundation and Books is itself

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[10]The only Commandments the State was able to link historically to legal or core values and ideals were "thou shalt not kill," "thou shalt not commit adultery," and "thou shalt not bear false witness against thy neighbors." However, even the links to these commandments were quite attenuated, as the State itself acknowledges that killing, in and of itself, is not illegal (moreover, the State itself authorizes death as punishment for certain crimes under certain circumstances), the links to adultery are found in statutes that are no longer on the books, and bearing false witness is only incorporated into our legal system to the extent that sworn witnesses are subject to perjury laws if they lie. Counsel also conceded that any association between the Second Commandment and old "Blue Laws" which in past times required certain commercial establishments to be closed for business on Sundays, and other such historical vestiges of the old sabbatic laws, is a stretch, and certainly not an expression of any "core" value or ideal.

secular, an issue that we expect to be resolved shortly by the Seventh Circuit, it is sufficient at this stage in these proceedings to note that the purposes are substantially different.[11] In addition, the witness's testimony in Freedom From Religion Foundation contradicts Indiana's concessions made at oral argument and described above. It is not enough to say that our nation's framers personally believed in the Ten Commandments, assuming they did, and offer that as proof that our country has incorporated those principles into the structures of government and adopted those values into the life of the republic from its inception. To the contrary, the First Amendment stands as strong and clear testimony to the fact that, while the framers may very well have known of and been influenced by the Ten Commandments in their personal religious and spiritual lives, such personal religious influences were not allowed to preempt, negate, or otherwise supersede our national preference for secular governmental structures.

Thus, we conclude that the State's articulated purpose in erecting a Monument depicting the Ten Commandments is not a valid secular purpose, but is in fact religious in nature. This conclusion is reinforced by the very design of the Monument, as well as its words. The Ten Commandments are not physically linked to the other texts on the display, appearing by themselves on one side of the large tablet-

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[11]It is for this reason that we regard the history of the original Ten Commandments monument that stood on the Statehouse grounds as irrelevant to our current analysis. On questioning at oral argument, the State acknowledged that the purposes behind the displays embodied in the 1958 monument and in the proposed monument are quite different -- the purpose for the original monument having been to provide a code of conduct while the purpose for the proposed monument is to remind people of our nation's core values and ideals. Further, and perhaps as important to our conclusion that the 1958 monument, its purpose and history are irrelevant, is the fact that that depiction was never subjected to a constitutional challenge.

shaped block. The other three sides of the Monument will, respectively, display the texts of other documents and the Monument's dedication. No indication will appear on the on the monument to the effect that the Ten Commandments are displayed for their historical significance, as might be suggested by their visual proximity to several other historical texts or with an explanatory marker.[12] Rather, the Ten Commandments will be displayed in such a way that a person looking at them will see only the Ten Commandments, as they are set out on a seven-foot tall limestone block. These factors reinforce our conclusion that the purpose of displaying the Ten Commandments is religious, not secular, and is thus, in violation of the Establishment Clause. Although this holding would suffice in terms of our First Amendment analysis, we nonetheless will address the second prong of the Lemon test as well.

b. Effect of the Proposed Monument

While the first part of the Lemon test focuses on the government's intent, the second prong demands that the challenged action not have the principal or primary effect of advancing religion. See Lemon, 403 U.S. at 612. "Following the Court's formal acceptance [of Justice O'Connor's formulation of the "endorsement test" enunciated in her concurrence in Lynch v. Donnelly, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring)] in [County of Allegheny, 492 U.S. at 595], the effect prong of [the Lemon test] has been analyzed under the 'perception of endorsement' test developed in [Lynch]." City of Marshfield, 203 F.3d at 493. Under this test, we must determine "'whether, irrespective of government's actual

[12]These are provided only as examples of alternative designs for the Monument. We express no opinion as to whether such depictions would ultimately overcome the decidedly religious purpose in the design of the currently proposed and planned Monument.

purpose, the practice under review in fact conveys a message of endorsement or disapproval.'" Id. (quoting Lynch, 465 U.S. at 691 (O'Connor, J., concurring)). If we find that a "reasonable person could perceive that a government action conveys the message that religion or a particular religion is favored or preferred, the Establishment Clause has been violated." City of Marshfield, 203 F.3d at 493 (citing Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 778-79 (1995) (O'Connor, J., concurring)). Although this is a "reasonableness" test, "[e]very government practice must be judged in its unique circumstances to determine" whether it endorses religion. Lynch, 465 U.S. at 694 (O'Connor, J., concurring). Thus, the context of the display, including its message, its presentation, and its surroundings must be factored into our determination.

In County of Allegheny, the content and location of the challenged displays assumed key roles in the Supreme Court's resolution of the constitutional issues presented. The Supreme Court reviewed a challenge to a creche displayed inside a county courthouse as well as the constitutionality of a menorah displayed outside the courthouse alongside a Christmas tree and a sign saluting liberty. The Court held that the creche was an unconstitutional endorsement of religion because there was nothing in its content or context that detracted from the religious message it imparted. See County of Allegheny, 492 U.S. at 598. Along with the overtly religious content of the display, the Court noted the importance that:

> the creche sits on the Grand Staircase, the 'main' and 'most beautiful part' of the building that is the seat of county government .... No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the 'display of the

> creche in this particular setting,' ... the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

Id. at 599-600 (internal citation and footnote omitted). Equally important was what the Court did not look to in examining the context of the display containing the creche. See id. at 598 n.48.

> The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and the nearby gallery forum, failed to negate the endorsement effect of the creche. The record demonstrates clearly that the creche, with its floral frame was its own display distinct from other decorations or exhibitions in the building.

Id.

In contrast, the Court did declare the display of the menorah to be constitutional. Unlike the creche, the constitutionality of which the Court examined by looking at the display alone, the Court looked at both the menorah and Christmas tree together and determined that the two symbols were not exclusively religious, but represented holidays with both secular and religious dimensions. See id. at 613-14. Thus, there was no endorsement, since "[i]n the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season." Id. at 617.

The Seventh Circuit likewise has held unconstitutional displays of a nativity scene displayed inside a city hall. See American Jewish Congress v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987). In American Jewish Congress, the

Seventh Circuit regarded as important the fact that the display was in the city hall, since:

> City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.
>
> The message of endorsement is equally powerful on the symbolic level. Like the nativity scene itself, City Hall is a symbol -- a symbol of government power. ... A creche in City Hall thus brings together Church and State in a manner that unmistakably suggest their alliance.

American Jewish Congress, 827 F.2d at 128.

In another case, when faced with a constitutional challenge to city seals that contained Christian symbols, the Seventh Circuit focused on the powerful relationship between the government and symbols that represented government power. See Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991). In Harris, the Seventh Circuit held that a city seal that contained within it the obvious presence of a Latin cross and a city's seal, emblem or logo that contained a Latin cross and the words "God Reigns" had the unconstitutional effect of endorsing religion. Id. at 1413, 1415. The court noted that "[l]ike the seat of county government in County of Allegheny, or the City Hall Building in American Jewish Congress, the corporate seal of a municipality is 'plainly under government control ... (and is) a clear symbol of government power.'" Id. at 1412 (quoting American Jewish Congress, 827 F.2d at 128). Moreover, the Seventh Circuit noted that the seal presented a

"more compelling case for finding the challenged display unconstitutional" due to its status as a permanent fixture as a symbol for the city. See id. at 1412. "The City's seal is a permanent statement that is viewed year-round, while the creche is displayed only seasonally amidst the secular celebration of Christmas." Id.

The location of a display involving the Ten Commandments, and its context, are just as important as with displays of other religious symbols, such as a creche or a Latin Cross. In his concurrence in County of Allegheny, Justice Stevens noted that a frieze on the south wall of the Supreme Court chambers included a depiction of Moses holding the Ten Commandments. See County of Allegheny, 492 U.S. at 652 (Stevens, J., concurring). He wrote that, standing alone, this image might be seen to convey a message of "respect for Judaism, for religion in general, or for law." Id. Such an image standing alone, or alongside images of Confucius and Mohammed, would not be tolerated by the First Amendment. See id. However, in the context of a display that depicts images of Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall along with these three religious leaders, the overall effect "signals respect not for great proselytizers but for great lawgivers." Id. at 652-53. Thus, the frieze as a whole is a "fitting message [for] a courtroom" and does not violate the First Amendment. Id. at 653.

In Harvey v. Cobb County, 811 F. Supp. 669 (N.D. Ga. 1993), aff'd, 15 F.3d 1097 (11th Cir. 1994) (table text), the county sought to place a display containing the Ten Commandments and the Great Commandment in a county courthouse. Id. at 671-72. The court, citing County of Allegheny, indicated that both the content and context of the display were significant in determining its constitutionality. See id. at 677. Relying on Stone, see supra, the court readily determined that the display had a religious content. See id.

(noting that Stone considered and rejected the argument that the Ten Commandments is not religious because it can be viewed as a "historical, jurisprudential cornerstone of American legal significance."). Equally significant to the court's holding that the display was unconstitutional was that, unlike the frieze on the wall of the Supreme Court discussed by Justice Stevens in County of Allegheny, it sat alone in an alcove in the courthouse without any countervailing secular passages or symbols present. See id. at 678.

> Moreover, the display is located in the Cobb County State Court Building, a seat of judicial authority in the county. Although the panel is not located in the most prominent part of the building, it is, nonetheless, located high on the wall, above a marble bench, near the Clerk's Office and the Traffic Court courtrooms. 'No viewer could reasonably think it occupies this location without the support and approval of the government.'

Id. (quoting County of Allegheny, 492 U.S. at 598).

In the trio of cases decided recently by the District Court for the Eastern District of Kentucky, the content and location of the displays again contributed to the conclusion that they unconstitutionally endorsed religion. As previously described, the displays consisted of the Ten Commandments and other texts chosen solely for their religious references. See McCreary County, 96 F. Supp. 2d at 687. The court held that the displays presented an "overriding theme ... of religion and more specifically of Christianity." Id. Moreover, the displays were placed in locations that had unique importance -- inside a courthouse and posted on classroom walls. See McCreary County, 96 F. Supp. 2d at 688-89 (courthouse); Harlan County Sch. Dist., 96 F. Supp. 2d at 676-77; Pulaski County, 96 F. Supp. 2d at 700

(courthouse). The court, in McCreary County, distinguished the display at issue in that case, located inside of a courthouse, from the displays found constitutional in Books, Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973), and Suhre, which displays were "removed from government buildings" and were "part of some larger artistic rendering or academic display encompassing a wide range of cultural, religious, and legal traditions." McCreary County, 96 F. Supp. 2d at 689.[13]

In contrast, as we have previously cited at length, in Freedom From Religion Foundation, the Supreme Court of Colorado held a display of the Ten Commandments constitutional. That display, made of stone and shaped in the form of two tables, contained a floral design, Phoenician letters that formed no intelligible words, an "all seeing eye," an American eagle grasping an American flag, a version of the Ten Commandments, two stars of David, the two Greek letters, Chi and Rho, one superimposed upon each other, which symbolize the first two letters in the name "Jesus Christ." See 898 P.2d at 1016. The Colorado monument was located in a state-owned park on property adjacent to, but removed from, the State Capitol building. See id. at 1015-16. The court held that the park was "more of a museum setting" and that the Ten Commandments monument itself was one of the "smallest and least

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[13]The court also noted that the Tenth Circuit has called into question its holding in Anderson, that a Ten Commandments monument identical to the one in Books and the one which previously stood on the Indiana Statehouse grounds was constitutional, in light of the Supreme Court's supervening opinion in Stone. See Summum v. Callaghan, 130 F.3d 906, 910 n.10 (10th Cir. 1997) (decided on grounds of freedom of speech). The Eastern District of Kentucky also doubted the validity of the holdings in Books and Anderson, given Stone's holding that a governmental requirement that the Ten Commandments be displayed in classrooms was unconstitutional. See McCreary County, 96 F. Supp. 2d at 688.

conspicuous displays" in the park. Id. at 1025. Moreover, the court found significance in the fact that the display, although on public property, was not located "where citizens exercising their right to access the courts or other government benefits might encounter the monument ... [but] in an inconspicuous place where citizens may be found by choice and are not necessarily present for purposes related to government." Id. In light of the many countervailing secular symbols surrounding the Ten Commandments on the face of the monument and given its out-of-the-way location, the court held that the monument was not an endorsement of religion. See id.

In Books, the monument was shaped in the form of two large, stone tablets, and had on its face the same display at issue in Colorado v. Freedom From Religion Foundation, Inc. See Books, 79 F. Supp. 2d at 983. It was located on a grass lawn near the entrance to a municipal building. See id. at 984. The court noted that other, historical monuments were maintained by the City, although "none are visible at the same time as the challenged monument," other than a War Memorials monument. Id. The court ruled that the content of the monument was not "exclusively religious," given its view that the Ten Commandments hold "both religious and historical significance in this nation." Id. at 1002. Despite the proximity of the monument to the entrance to the courthouse, the court held that the monument was not "obtrusive" and thus was constitutional in its context. See id.

In Suhre, the monument in question contained small plaques containing the Ten Commandments, but was "overwhelmingly dominated by Lady Justice and which contain[ed] other secular objects such as the sword of justice and the scales of justice flanked by the American and North Carolina flags." Suhre, 55 F. Supp. 2d at 395-96. Much like the frieze discussed by Justice Stevens in County of

Allegheny, given its context, "[t]he display touts nothing more than an effort to recall the origin of modern law, by reference to an ancient source of law and justice. The overall, basic message is equal justice before the law." Id. at 397. Thus, although the frieze was located in a courtroom, the court held it not to violate the Establishment Clause. See id. at 399.

Turning to the facts of our case, we must determine whether a reasonable person would perceive the Monument as conveying a message of government endorsement of religion. See Lynch, 465 U.S. at 692 (O'Connor, J., concurring); City of Marshfield, 203 F.3d at 493. We conclude that a reasonable person looking at this monument would undoubtedly view it as an endorsement of religion.

Looking at the monument itself, two factors strongly indicate an endorsement of religion. One is that the text of the Ten Commandments is prominently located, to the exclusion of everything else, on one side of this seven-foot tall monument. Although the direction the monument will face has not yet been determined, people who approach the monument from the side on which the text Ten Commandments is contained will see only that. In order to understand the "historical context" which the State says is the Monument's intended purpose, a person would have to walk completely around the monument, in a 360-degree manner, to see the Bill of Rights, the Preamble to the Indiana Constitution, the Ten Commandments and the dedication. The State, itself, acknowledged at oral argument that a reasonable person would not likely circumnavigate the Monument, especially when there are no pathways immediately near or around it.

Moreover, even if a person were to review the entire texts on all four sides of the Monument, there is nothing that would allow a reasonable person to put the documents into a

secular context. While the State argues that the "secular" language predominates on the face of the Monument, we disagree. It is undisputed that the engraved letters forming the Ten Commandments will be one inch tall and all capital letters, a typeset that no doubt is intended to indicate the importance of the ideals contained therein. In contrast, the size of the lettering of the Bill of Rights is to be only five-eights of an inch high and the text of the other documents is likely to be even smaller. Looking at these documents together, the Ten Commandments would likely be viewed as the most prominent in comparison to the other depictions on the Monument.

In addition, no marker identifies any linkage among the documents on the Monument. In fact, the Preamble to the Indiana Constitution is unattributed as such, the words merely being laid out on one side of the Monument for people to read without further explanation, identification or authentication. Reviewing the Monument as a reasonable person would, it is likely that a religious message would be perceived, rather than a "historical" one.

Even if we extend our examination of the context of the display to the other displays on the Statehouse lawn, we still must conclude that the message endorses religion.[14] This monument is designed to be quite substantial, standing seven-feet tall and weighing almost 11,500 pounds. From

---

[14]The State contends that the monuments contained in the interior of the Statehouse must also be considered, as most Plaintiffs contend that they will pass the Monument to do business inside of the Statehouse. See Opp'n Mem. at 10. However, County of Allegheny made it clear that we are to examine the display in a context that is reasonable. See id. at 598 n.48. Here, as in County of Allegheny, the presence of other monuments in locations remote from the challenged monument is not reasonably regarded as part of the context. Thus, we regard the presence of monuments inside of the Statehouse as irrelevant to our analysis.

the descriptions of the other displays on the Statehouse lawn, it will certainly stand out. The majority of the displays on the lawn are either placards dedicating trees or statues of historical figures; those that are not placards or statues are in the shapes of nondescript blocks or pillars or plates. In contrast, the size and shape of the Monument accentuate its religious message. The Ten Commandments and the Bill of Rights will each be on a tablet-shaped block of limestone, a shape which we have previously noted is unique and unmistakable. Even if one cannot read the text of the Monument without approaching it, as the State argues, one will clearly be able to identify the shape of this seven-foot tall monument from some distance across the Statehouse lawn. Indeed, we assume this is one of the purposes of utilizing this unique shape -- that it will be recognizable from a distance -- since no paths are to be constructed to allow for closer viewing. Thus, while the State argues that only those who choose to approach will read the message of the Monument, we believe that anyone walking along the south or west side of the Statehouse who sees the shape of the Monument will undoubted associate it with and regard it as an explicit endorsement of the Ten Commandments.

The imputed endorsement is enhanced as well due to the planned location for the Monument. This is not a display that is going to be placed in a museum-like setting or in a park far removed from the seat of governmental power. See Freedom From Religion Found., 898 P.2d at 1025; see also Doe v. Small, 964 F.2d 611, 619 (7th Cir. 1992). Like the displays found unconstitutional in County of Allegheny, American Jewish Congress, Harris, and Harvey, the Monument is to be located on the lawn of the Statehouse, at the seat of government for the entire state, an area over which the State has exclusive and obvious control. While the Monument will not be physically in or on the building that provides the locus of the State government's power, its placement will be well within the boundaries of the property

that a reasonable person would associate with the Statehouse itself, "marked with the stamp of government approval ... [and] inevitably creat[ing] a clear and strong impression that the ... government tacitly endorses" religion. American Jewish Congress, 827 F.2d at 128. Although Books found that a monument displaying the Ten Commandments on the lawn of the city's municipal building did not convey this stamp of approval by the government, we say respectfully that we likely would not share that assessment.

Equally important as the Monument's overall endorsement of religion is the fact that it will become a permanent display. Unlike the seasonal displays held constitutional in County of Allegheny and Lynch, the Monument is not a temporary display that will be placed on the Statehouse lawn on a temporary basis. In fact, everything about it's size and construction evinces permanence. Like the seals found unconstitutional in Harris, the Monument is a display intended to be a "permanent statement that is viewed year-round." Harris, 927 F.2d at 1412. This aura of permanence strengthens the message of endorsement that a reasonable person would perceive.

Thus, because of the content and shape of the proposed Monument, the proposed location and the permanence of the display, we conclude that a reasonable person would perceive in this display a message of government endorsement of religion, which compels our finding that the Monument fails the second prong of the Lemon test.

c. Conclusion

We have thus determined that Plaintiffs have shown a likelihood of prevailing on the merits of their First Amendment claim, in that the Monument, according to our preliminary analysis, fails both the first and second prongs of the Lemon test, by having a religious purpose and by its implied endorsement of religion. Either of these deficiencies would suffice to cause a violation of the Establishment Clause. Accordingly, we hold that Plaintiffs have established a reasonable likelihood of succeeding on the merits of their First Amendment challenge.

2. Inadequate remedy at law and irreparable harm

The State has conceded that no adequate remedy at law exists for the Plaintiffs' potential First Amendment harm. While the State questions the harm that will be experienced by the Plaintiffs if we fail to enjoin the placement of the Monument, a First Amendment violation, for even "minimal periods of time," is "unquestionably ... irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality).

3. Balance of harms to the parties and the public interest

The State asserted at oral argument that the harm to itself, if erection of the Monument is enjoined pending a final ruling on the merits (and perhaps an appeal), will occur by its being placed in the position of receiving a gift which it would be unable to accept. Compared to the effects of the possible First Amendment violation that would be incurred by the Plaintiffs if we fail to enter an injunction, the State's harm is clearly inconsequential. We have difficulty, in truth, seeing any actual harm to the State from a granting of injunctive relief. Further, the resultant harm of allowing the construction of the Monument to go forward, only to have to tear it all down if it is finally held to be unconstitutional, is

obvious to all. As previously noted, the Seventh Circuit Court of Appeals currently has under advisement the Northern District of Indiana's opinion in Books, the resolution of which promises to have a significant impact on the resolution of this case. In light of that impending ruling, maintenance of the status quo is altogether prudent. We believe this result to be fully consonant with the public interest as well.

Conclusion

Having determined that the Plaintiffs have a reasonable likelihood of succeeding on the merits of their First Amendment challenge, that they have no adequate remedy at law and would suffer irreparable harm if preliminary relief were to be denied, that the balance of the harms favors the Plaintiffs, and that the public interest is in line with granting the Plaintiffs their requested injunctive relief, we hold that the Plaintiffs are entitled to their requested relief. Plaintiffs' motion for preliminary injunction is GRANTED. Pending a resolution of the merits of this case or until further order of the Court, we Hereby ENJOIN the State from henceforth taking any further steps to erect the proposed monument containing the Ten Commandments, the Bill of Rights, and the Preamble to the Indiana Constitution on the Statehouse grounds.

It is so ORDERED this 28th day of July 2000.

/s/ Sarah Evans Barker
SARAH EVANS BARKER, CHIEF JUDGE
United States District Court
Southern District of Indiana

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United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

October 2, 2001

Before

Hon. JOEL M. FLAUM, *Chief Judge*

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. JOHN L. COFFEY, *Circuit Judge*

No. 00-3011

INDIANA CIVIL LIBERTIES UNION, et al., *Plaintiffs-Appellees*,	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
v.	
FRANK O'BANNON, GOVERNOR OF INDIANA, *Defendant-Appellant.*	No. 00 C 811
	Sarah Evans Barker, *Judge*.

ORDER

On consideration of the petition for rehearing *en banc* filed in the above-captioned case by the defendant-appellant, and the response thereto, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny. Therefore, the petition for rehearing is hereby DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA CIVIL LIBERTIES UNION, *et al.*,	)	
Plaintiffs,	)	
v.	)	No. IP-00-0811-C B/S
FRANK O'BANNON, *et al.*,	)	
Defendant.	)	

STIPULATIONS OF FACT

Come now the parties and stipulate to the following facts. Although the parties stipulate to these facts, they do not agree that they are necessarily relevant to the resolution of this matter and reserve the right to object to their use on that ground. These stipulations only bind the parties for purposes of the preliminary injunction.

1. Indianapolis is the capital of the State of Indiana.

2. The Indiana Statehouse is located in Indianapolis and contains the office of the Governor, the Indiana General Assembly and the offices of the members of the General Assembly, the Indiana Supreme Court and the offices of the justices, the Indiana Court of Appeals and offices of some of the judges of the Indiana Court of Appeals as well as the offices of certain other Indiana constitutional and statutory officeholders.

3. The Statehouse is located between Ohio Street to the North, Washington Street to the South, Capitol Avenue to its East and Senate Avenue to the West.

4. Immediately to the North of Washington Street there is a large plot of land on the grounds of the Statehouse immediately in front of the South entrance to the Statehouse. It is approximately 1.93 acres.

5. Washington Street was formerly U.S. 40.

6. The attached document, Exhibit 1, accurately quotes the comments of Governor Frank O'Bannon.

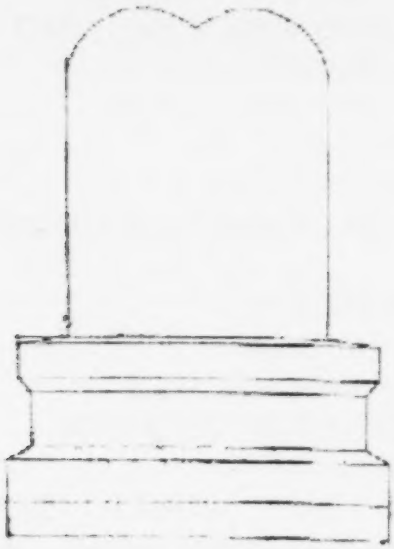
7. The planned monument will be made of two blocks of Indiana limestone and will be approximately 11,500 pounds in weight.

8. The monument will consist of a rectangular base block which will be approximately 6'7" wide, 4'7" deep and 2'8" in height.

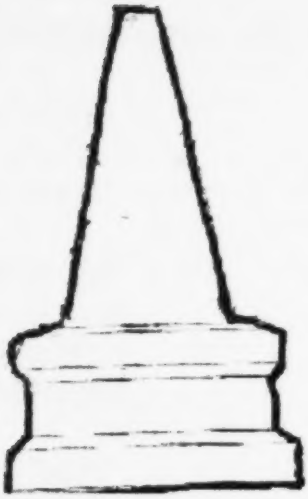
9. On top of this rectangular block will be a four sided block of limestone that will be tapered at its highest point. The block will be about 4'4" tall and will go from 3' wide at its base to 6" wide at its highest point. The two larger sides of the block will be approximately 3'7" in width. The two small sides will taper from approximately 2 ½ feet in width to approximately 6" in width.

10. Taken together, therefore, the monument, including both blocks, will be approximately 7' wide at its highest point and 6'7" wide at its widest point. It will be more than four feet deep at its deepest point.

It will appear as indicated below.



Front View



Side View

11. One large face of the monument will have inscribed on it the following:

TEN COMMANDMENTS

I. THOU SHALT HAVE NO OTHER GODS BEFORE ME

II. THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE

III. THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN

IV. REMEMBER THE SABBATH DAY TO KEEP IT HOLY

V. HONOR THY FATHER AND THY MOTHER THAT THY DAYS MAY BE LONG IN THE LAND WHICH THE LORD THY GOD GIVETH THEE

VI. THOU SHALT NOT KILL

VII. THOU SHALT NOT COMMIT ADULTERY

VIII. THOU SHALT NOT STEAL

IX. THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR

X. THOU SHALT NOT COVET THY NEIGHBORS HOUSE OR WIFE OR ANYTHING THAT IS THEY NEIGHBORS

12. There will be nothing else on this side of the monument.

13. It is unclear how large the lettering spelling the "Ten Commandments" on the monument will be. The text of the monument itself will be approximately one (1) inch in height.

14. On the other large face of the monument there will be carved into the limestone the text of the Bill of Rights underneath a heading entitled "Bill of Rights".

15. The text will be within the same tablet shape as the Ten Commandments. There will be nothing else on this side of the monument.

16. Because the text of the Bill of Rights is longer than that of the Ten Commandments the lettering of the

text of the Bill of Rights will be approximately 5/8" high.

17. On one of the small sides of the monument will be carved the following:

> Gift of the Indiana Limestone Industry — 2000 A.D.
>
> This monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of the Eagles on October 25, 1958.

18. It is unclear how large the above lettering will be. But, it will be balanced with the rest of the monument.

19. On the other side of the monument will be carved the Preamble to the Indiana Constitution. It will not be labeled in any way and will therefore indicate:

> To the end, that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of the right to choose our own form of government, do ordain this Constitution.

20. At this time it is not clear how large the above lettering will be and whether all, or a portion of the text will be in large or small type. However, it will be balanced with the rest of the monument.

21. The monument is being constructed with donated labor and materials by various members of the limestone industry in, and around, the Bedford, Indiana area.

22. State Representative Brent Steele worked out an initial design for the monument and this design was refined by Hoosier Drafting, a design firm that donated its labor.

23. The monument will be available for delivery to the State of Indiana no earlier than mid-August of 2000.

24. From 1958 until 1991 a monument containing the Ten Commandments was located in the southwest portion of the Statehouse lawn. It had been donated by the Fraternal Order of Eagles and was knocked over by vandalism in 1991.

25. This former monument was 7' high, 3' wide and flanked by smaller tablets which listed all the chapters and auxiliaries of the Eagles in Indiana.

26. One of the plaintiffs, Steven Schroeder, was convicted of misdemeanor criminal mischief for vandalizing the former monument.

27. Representative Steele intended the text of the Ten Commandments on the new monument to be identical to that on the former monument.

28. The new monument will be located near the site of the former monument near the Southwest corner of the grounds of the Statehouse. The exact location has not yet been determined. It is also still not clear how the new monument will face.

29. The new monument will be installed with donated labor and its installation will not cost the State of Indiana anything.

30. The attached diagram, Exhibit 2, demonstrates the location of other monuments and points of interest on the exterior grounds of the Statehouse along with their photographs.

31. On the interior of the Statehouse there is a plaque stating "In God We Trust" on the side of one of the pillars in the Rotunda. The plaque is approximately 8 ½" by 18". A similar plaque is contained in the Courtroom of the Indiana Supreme Court which is located on the Third Floor of the Statehouse.

32. On the Fourth Floor of the Statehouse there is a room designated as a "Meditation Room." It is used for, among other things, religious worship as well as meditation.

33. Exhibit 2 is drawn to scale. One inch on Exhibit 2 is approximately 100 feet.

34. The site of the former Ten Commandments monument is within the triangular portion of grass shown on Exhibit 2 as containing the Schricker tree (numbered 3 on Exhibit 2).

35. The site is approximately 113 feet north of the north edge of the Washington Street sidewalk, approximately 83 feet south of the middle of the east-west walkway that touches the South side of the Statehouse, and approximately 19 feet east of the Senate Avenue sidewalk.

36. The site of the former monument is approximately 41 feet away from Governor Schricker's tree (No. 3 on Exhibit 2) and 92 feet away from the National Historic Civil Engineering Landmark (No. 4 on Exhibit 2).

37. The Christopher Columbus monument (No. 2 on Exhibit 2) is approximately 43 feet north of the east-west sidewalk that touches the South side of the Statehouse.

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FRANK O'BANNON
GOVERNOR

FOR IMMEDIATE RELEASE Tuesday, March 14, 2000

New monument will include Bill of Rights

O'Bannon signs 10 Commandments bill; outlines new Statehouse monument design

Governor Frank O'Bannon today signed legislation to let state and local governments display the 10 Commandments in a historical context.

At the same time, O'Bannon announced that a new monument will be erected on the Statehouse lawn this summer, featuring not only the 10 Commandments but also the preamble to the U.S. Constitution and the Bill of Rights.

"For more than three decades, a monument inscribed with the 10 Commandments stood on the Statehouse lawn as a reminder of some of our nation's core values," the governor said.

"Soon those words will stand alongside the abiding principles of our form of government, especially its protections of individual rights," O'Bannon added. "They're ideals we all need to be reminded of from time to time."

Effective July 1, House Enrolled Act 1180 permits units of government, including schools, to display the Ten Commandments, if they so choose, along with other documents of historical significance that have formed and influenced the legal or governmental system of the United States.

The legislation received overwhelming bipartisan support, adopted by votes of 90-6 in the Indiana House of Representatives and 40-10 in the state Senate.

Representative Jerry Denbo authored the bill, whose lead sponsor was state Senator Kent Adams. State Representative Brent Steele co-authored and is spearheading the monument project.

"Our entire Statehouse is rich with other monuments to our heritage," Steele said. "This new monument will soon take its proper place alongside such historic figures as Oliver P. Morton, Thomas A. Hendricks, George Washington and Christopher Columbus."

"The new monument will be an integral part of the Statehouse setting, which honors the history of our state and our nation," O'Bannon added.

Also displayed on the Statehouse lawn are memorials to returning veterans of the Civil War and to the wartime efforts of Hoosier women.

Other markers note the significance of U.S. Highway 40, which passes the Statehouse. In the 1800s it was known as the National Road, and Congress used it to promote the young nation's westward settlement.

In addition to the historical text to be inscribed on the new monument, Steele said it will honor the Indiana State Aerie and Auxiliaries of the Fraternal Order of Eagles, based in Anderson, which donated an earlier 10 Commandments monument to the state in 1958.

"In the fifties, Eagles lodges across the country donated monuments like the one we had to their home states," Steele said. "We thought it only right that we note on the new monument that is replaces one given so generously before."

After gracing the Statehouse lawn for three decades, the original monument was broken in a series of acts of vandalism. The Eagles reclaimed and repaired it at a cost of about $2,500. It now stands outside the Anderson lodge, somewhat battered but still at its original 6-foot height and 5-foot width.

The new monument, valued at more than $20,000, will be about 4 feet high, 5 feet wide and 4 feet deep. It will stand on the spot formerly occupied by the Eagles' monument.

Jack R. Moore, state conductor of the Indiana State Aerie, Fraternal Order of Eagles, and an officer of the Anderson Lodge, said he looks forward to the dedication ceremony for the new monument.

"We were proud to have donated the first monument, and we're really pleased to be recognized on the new one," Moore said. "It's a wonderful thing for the state."

To be carved from a 9-ton block of Lawrence County limestone, the monument is planned as a gift to the state solicited by Representative Steele from five Southern

Indiana companies. They will provide the stone, design and carve it and then transport and install it.

"On behalf of all Hoosiers, I want to thank Representative Steele, the Elliott Stone Company, Evans Limestone Company, Watterson Monument Service, Hoosier Drafting and Charles Jones, engineer, for their generosity," O'Bannon said. "The monument they envision will be a wonderful addition to the many historic markers on the Statehouse grounds.

Reporters'
contact: Phil Bremen or Cheryl Reed, 317-232-4578

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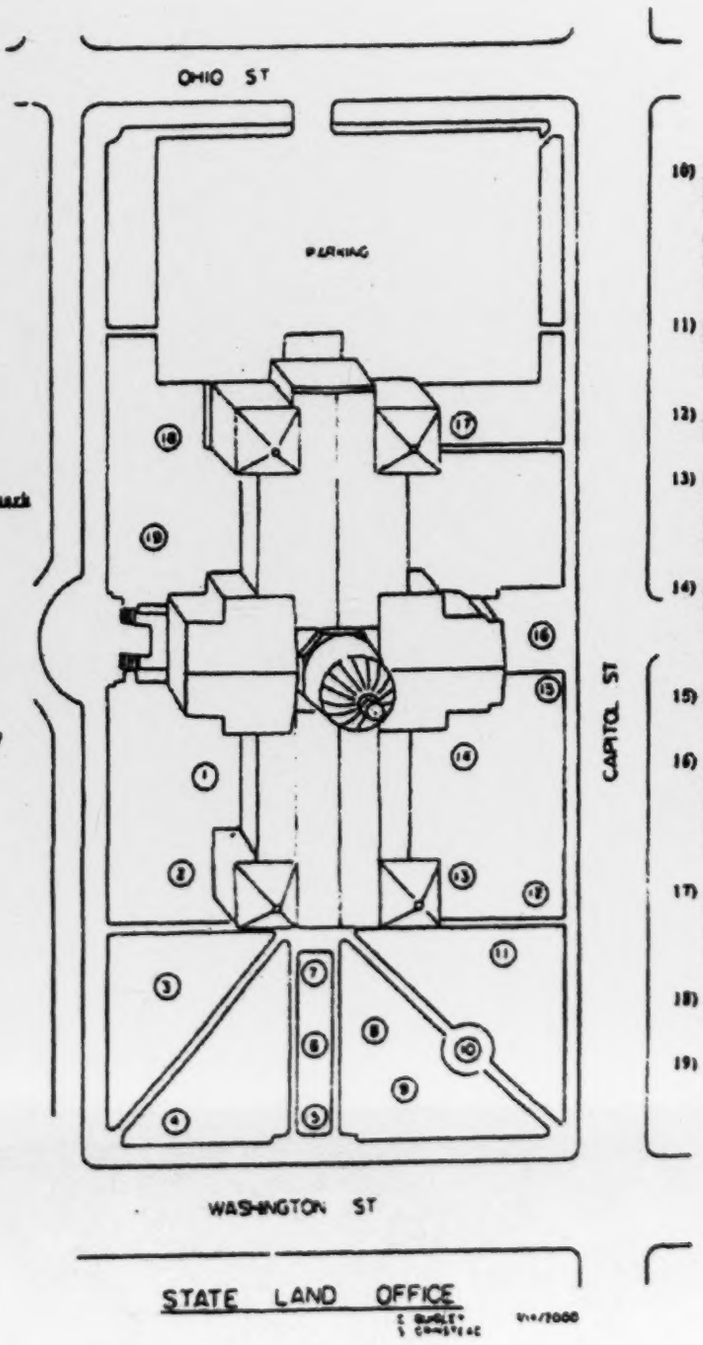

1) Each Governor Plant a Tree
Governor Henry F. Schricker
Dedicated by Albert Williams
Knox American Legion Post
April 29, 1946
Plaque 24" x 16"

2) Christopher Columbus Monument
Erected 1920 by Italians of Indiana
6' 6 ½" x 6' 8 ½" base x 12' tall

3) Each Governor Plant a Tree
Governor Henry F. Schricker
Dedicated April 14, 1944
Plaque 1' x 1'

4) National Historic Civil Engineering Landmark
Dedicated October 12, 1976
4' tall x 2' wide

5) The National Road Monument
7' tall x 3' wide

6) George Washington Monument
Dedicated by: the Freemasons of Indiana,
The George Washington Commission, and
The Grand Lodge Free and Accepted
Masons of the State of Indiana, May 19, 1927
5' 6" wide x 3 ½' deep x 5' tall

7) Robert Dale Owen Monument
Dedicated 1911
3' ½" wide x 3' ½" deep x 5' tall

8) Martin H. Miller
Tree dedication April 30, 1982
Plaque 2' ½" x 1' 5"

9) Governor Matthew E. Welsh
Tree dedication April 14, 1961
Sponsored by Assoc. of Soil and Water
Conservation Districts of Indiana and
Explorer Post, B.S.A. of Indianapolis
Plaque 1' 7" x 1' 2"

10) Thomas Andrew Hendricks Statue
Erected 1890
Vice President 1885
Governor 1873-77
Senator 1863-69
20' wide x 12' deep x 30' tall

11) Governor Ralph F. Gates
Tree dedication April 26, 1946
Plaque 1' x 1'

12) Unknown Marker
Plaque 1' 1" x 1" x 1"

13) Governor Townsend
Tree dedication January 26, 1940
By North Judson Legion Post
Plaque 8" x 10"

14) Bicentennial Moon Tree
Governor Otis Bowen
Tree dedication April 9, 1976
Plaque 1' 2" x 1' 12"

15) State Capitol Historical Marker
3' 9" x 3' 6" x 7' tall

16) Oliver Perry Morton Statue
Dedicated by The Grand Army of the Republ
Governor 1861-67
Senator 1867-77
20' x 15' x 35' height

17) Lt. Governor Crawford F. Parker
Tree dedication April 10, 1959
Contributed by Indiana Arborist Assoc.
Plaque 1' 8" x 1' 1"

18) Unknown Marker
Plaque 2' x 2'

19) Coal Miner Statue
3' x 3' x 11' - 1966

Supreme Court, U.S.
FILED
JUL 22 2002

No. 01-966

In The

Supreme Court of the United States

FRANK O'BANNON, in his official capacity as Governor of Indiana,

Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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3298

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in affirming a preliminary injunction which prevented the Governor of Indiana from erecting on the lawn of the Indiana Statehouse a nearly seven foot high and nearly six ton tablet shaped monument dominated by the text of a version of the Ten Commandments?

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STATEMENT OF THE CASE

The Indiana Statehouse, located in Indianapolis, is the seat of governmental power for the State of Indiana, containing, among other offices, those of the Governor, General Assembly, and the Indiana Supreme Court. (Petitioner Appendix [hereinafter "Pet.App."] 4a). The grounds of the Statehouse are approximately two acres. (Pet.App. 29a).

In March of 2000, Governor O'Bannon announced plans to accept a donated monument containing, among other things, a version of the Ten Commandments. (Pet.App. 71a). The intended monument was to be made of two blocks of Indiana limestone weighing approximately 11,500 pounds. (Pet.App. 64a). The base block of the monument would be rectangular and on top of that would be placed an angled block containing two large faces and two smaller sides. (Pet.App. 64a, 65a). In total the monument would be approximately seven feet high at its highest point and six feet seven inches wide at its widest point. (Pet.App. 64a). The monument would be tablet shaped. (Pet.App. 65a).

One large face of the monument would have inscribed on it the following version of the Ten Commandments.

TEN COMMANDMENTS

I. THOU SHALT HAVE NO OTHER GODS BEFORE ME

II. THOU SHALT NOT MAKE UNTO THEE ANY GRAVEN IMAGE

III. THOU SHALT NOT TAKE THE NAME OF THE LORD THY GOD IN VAIN

IV. REMEMBER THE SABBATH DAY TO KEEP IT HOLY

V. HONOR THY FATHER AND THY MOTHER THAT THY DAYS MAY BE LONG IN THE LAND WHICH THE LORD THY GOD GIVETH THEE

VI. THOU SHALT NOT KILL

VII. THOU SHALT NOT COMMIT ADULTERY

VIII. THOU SHALT NOT STEAL

IX. THOU SHALT NOT BEAR FALSE WITNESS AGAINST THY NEIGHBOR

X. THOU SHALT NOT COVET THY NEIGHBORS HOUSE OR WIFE OR ANYTHING THAT IS THEY [sic] NEIGHBORS

(Pet.App. 65a-66a). There would be nothing else on this side of the monument. (Pet.App. 66a). The lettering of the text of the Decalogue would be approximately one (1) inch in height. (*Id.*). It is uncertain as to how large the lettering would be which spells out "TEN COMMANDMENTS." (*Id.*).

The other large tablet face of the monument would contain the text of the Bill of Rights under a heading marked "Bill of Rights." (*Id.*). Because the text of the Bill of Rights is longer than that of the Ten Commandments,

the printing of the Bill of Rights would be smaller than that of the Ten Commandments. (Pet.App. 66a, 67a). The text of the Bill of Rights would only be approximately 5/8" in height. (*Id.*).

On one small side of the monument would be an indication that it would be a gift of the Indiana Limestone Industry to replace a former monument. (Pet.App. 67a).[1] The other small side would contain the unattributed text of the Preamble to the Indiana Constitution. (*Id.*).[2]

At the current time, on the almost two acre grounds of the Statehouse there are statues of Christopher Columbus, George Washington, a coal miner, Governor Hendricks and Governor Oliver Morton. (Pet.App. 5a, 64a). There are also a number of ornamental trees with placards indicating that they were donated by former governors. (Pet.App. 29a, 75a). Finally, there are monuments on the grounds honoring the National Road as well as the State capitol itself. (*Id.*).

The proposed monument would be placed on the southwest corner of the Statehouse grounds, near the site of a different Ten Commandments monument which was removed in 1991. (Pet.App. 68a). This area contains only a

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[1] The text would read: "Gift of the Indiana Limestone Industry – 2000 A.D. This monument replaces one donated by the Aeries and Auxiliaries of the Indiana Fraternal Order of the Eagles on October 25, 1958." (Pet.App. 67a).

[2] The preamble states: "To the end that justice be established, public order maintained, and liberty perpetuated: We, the People of the State of Indiana, grateful to Almighty God for the free exercise of our right to choose our own form of government, do ordain this Constitution." (Pet.App. 67a).

tree marked with a placard indicating it was dedicated by former Governor Schricker, as well as a four foot high by two foot wide monument honoring the National Road. (*Id.*). Although the precise location and orientation of the proposed monument is not certain, it would be approximately forty-one feet from Governor Schricker's tree and ninety-two feet from the four foot high National Road monument. (Pet.App. 5a, 75a).

The tablet shape of the monument is unique and unmistakable in that it is the form widely used in artistic depictions of the Ten Commandments. (Pet.App. 33a, 57a). Even if someone is physically removed from the proposed monument so that its text cannot be read, the unique shape will make the monument identifiable from some distance away from the monument. (Pet.App. 57a).

In announcing that he was planning to accept the monument and place it on the Statehouse grounds, Governor O'Bannon stated that the prior Ten Commandments monument, to be replaced by the proposed one, served "as a reminder of some of our nation's core values." (Pet.App. 71a). He also noted that the words of the Ten Commandments and the Bill of Rights and the preamble to the Indiana Constitution are "ideals we all need to be reminded of from time to time." (*Id.*). He also stated that "[t]he new monument will be an integral part of the Statehouse setting, which honors the history of our state and our nation" and that it "will be a wonderful addition to the many historic markers on the Statehouse grounds." (Pet.App. 72a, 74a).

This action was brought by the Indiana Civil Liberties Union and a number of individuals, including two

ministers and a rabbi. The district court granted a preliminary injunction against the Governor placing the monument on the Statehouse grounds, finding that given the Governor's statements concerning the monument and given its design, its purpose was a religious one in violation of the first prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). (Pet.App. 40a-47a). Additionally, the district court found that a reasonable person would conclude, after reviewing the monument and its context, that the Ten Commandments monument was an endorsement of religion by the government which violated both the second prong of *Lemon* as well as *County of Allegheny v. American Civil Liberities Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) and *Lynch v. Donnelly*, 465 U.S. 668, 691 (1984) (O'Connor, J., concurring). (Pet.App. 47a-58a).

A divided panel of the Seventh Circuit affirmed the granting of the preliminary injunction. The majority found that the articulated purposes for the Ten Commandments monument were not secular and therefore the first prong of *Lemon* was violated since the Governor had failed to articulate a valid secular justification for placing the Ten Commandments, a sacred and religious text for Jews and Christians, on the grounds of the Statehouse. (Pet.App. 7a-9a). The majority also found that the second prong of *Lemon*, and the endorsement test, would be violated by the Ten Commandments monument since a reasonable observer would view the monument as an endorsement of religion. (Pet.App. 9a-13a). This conclusion would be reached if one looked at the Ten Commandments on the monument by itself or in combination with the other documents on the monument. (Pet.App. 11a-12a). Additionally, the majority concluded that

"[n]othing in the context of the monument itself or the surrounding grounds mitigates the religious message conveyed." (Pet.App. 12a). Judge Coffey dissented from the majority's decision. (Pet.App. 13a).

ARGUMENT

Reasons for Denying the Writ

Plenary review in this case is inappropriate for three reasons. First, the Court of Appeals correctly applied settled Establishment Clause jurisprudence in finding that respondents had demonstrated a probability of success on the merits that the Governor's placement of a nearly six ton and seven foot high tablet shaped Ten Commandments monument on the lawn of the Statehouse was a violation of the First Amendment. The Governor merely seeks to correct what he deems to be a misapplication of principles of law upon which all sides agree. Although the Governor asserts that the Court of Appeals misapplied both the secular purpose prong of *Lemon v. Kurtzman, supra,* as well as the endorsement test of *Lynch v. Donnelly, supra,* and *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, supra,* the Court of Appeals' decision is entirely consistent with those decisions and is consistent with Establishment Clause jurisprudence.

Second, plenary review should not be granted to resolve what petitioner characterizes as a conflict with either the Tenth Circuit's opinion in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.), *cert. denied*, 414 U.S. 879 (1973), or the Colorado Supreme Court's decision in *State*

of Colorado v. Freedom from Religion Foundation, 898 P.2d 1013 (Colo. 1994), *cert. denied*, 516 U.S. 1111 (1996). The latter case involved a Ten Commandments display in a completely different context than the one presented in the case at bar and the former case has been questioned and undermined by the very court which issued it. The Court of Appeals decision does not create a current conflict with existing law.

Third, the fact that there are other lower court cases concerning Ten Commandments displays and the fact that there exists interest in some sectors of public life in possibly creating such displays is no reason to grant plenary review when this Court has previously established the principles of law which must be used, in each individual case, to assess the constitutional validity of the displays.

I. The Seventh Circuit's decision in this case correctly recognized and applied this Court's holdings in determining that the proposed monument lacks a valid secular purpose and that, regardless of purpose, it represents an endorsement of religion

A. The Governor seeks plenary review merely to challenge the Seventh Circuit's application of established jurisprudence to the particular facts and circumstances of this case

The test for determining whether religious displays on government property violate the Establishment Clause is set out in *Lemon*. Under *Lemon's* tripartite analysis a challenged governmental practice is constitutional only if: 1) it has a secular purpose, 2) its principal effect neither inhibits nor advances religion, and 3) it does not

foster excessive entanglement.[3] Governmental action "violates the Establishment Clause if it fails to satisfy any of these prongs." *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In *County of Allegheny*, a majority of the Court adopted the endorsement analysis presented by Justice O'Connor in her concurrence in *Lynch* which modified the "effects" prong of *Lemon* to ask "whether, irrespective of government's actual purpose, the practice under review, in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *County of Allegheny*, 492 U.S. at 592. *See also, Santa Fe Independent School District v. Doe*, 530 U.S. 290, 307 (2000) (focusing on "[t]he actual or perceived endorsement of the message."). In determining whether an endorsement exists a court must focus on the precise factual context of the matter being challenged since, for example, "a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement . . . . " *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). Of necessity, therefore, when a determination is being made as to whether a specific government practice, reviewed in its context,

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[3] In *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (plurality opinion), the plurality noted that to some extent the "excessive entanglement" prong of *Lemon* has been absorbed into the "primary effect" prong. This further refining of *Lemon* is not relevant here since the respondents have never claimed that the challenged Ten Commandments monument creates an "excessive entanglement."

violates the Establishment Clause, "the inquiry calls for line-drawing; no fixed, *per se* rule can be framed." *Lynch*, 465 U.S. at 678.

The Seventh Circuit properly recognized that this was the law governing the Establishment Clause and that this was the law which had to be applied to determine if the Governor's planned placement of the Ten Commandments monument on the lawn of the Statehouse was unconstitutional. (Pet.App. 7a). The Governor objects because, in his estimation, the Court of Appeals applied this settled law incorrectly. Given that the results of the application will necessarily be altered by the unique facts and context of each display, the fact that, in the Governor's opinion, the Seventh Circuit applied the law incorrectly is not grounds for plenary review.[4] And, the Court of Appeals applied the law correctly.

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[4] A review of recent decisions concerning the display of the Ten Commandments on government property indicates that, regardless of their holdings, courts well understand that they must analyze both the purpose of such displays and whether, based on the specific context, an endorsement of religion or religious belief is created. *See, e.g., American Civil Liberties Union v. McCreary County*, 145 F.Supp.2d 845 (E.D.Ky. 2001), *appeal pending*, No. 01-5935 (6th Cir.) [preliminary injunction granted against displays in courthouses and schools which contained, among other things, the Ten Commandments]; *Kimbley v. Lawrence County, Indiana*, 119 F.Supp.2d 856 (S.D.Ind. 2000) [preliminary injunction issued against Ten Commandments monument on the lawn of a county courthouse]; *Adland v. Russ*, 107 F.Supp.2d 782 (E.D.Ky. 2000), *appeal pending*, No. 00-3139 (6th Cir.) [permanent injunction issued against placing Ten Commandments monument on the grounds of the Kentucky Statehouse]; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky*, 96 F.Supp.2d 691 (E.D.Ky. 2000) [preliminary injunction issued against a display of Ten Commandments and

B. Applying this well accepted analysis, the Court of Appeals correctly found that the Ten Commandments monument, in its specific context, would lack a valid secular purpose and would represent an endorsement of religious belief

1. The Seventh Circuit properly found that the monument would lack a secular purpose

In *Stone v. Graham*, 449 U.S. 39, 41 (1980) (*per curiam*), in striking down a Kentucky statute which required the posting of the Ten Commandments in classrooms, the Court stated the obvious when it indicated that the Ten Commandments is an "undeniably sacred text in the Jewish and Christian faiths . . . . " Given the clear religiosity of the Ten Commandments, the Seventh Circuit placed the burden on the Governor to demonstrate a secular

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other documents in county courthouse]; *Doe v. Harlan County School District*, 96 F.Supp.2d 667 (E.D.Ky. 2000) [preliminary injunction issued against posting of Ten Commandments and other documents containing references to God and the Bible in a public school]; *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 96 F.Supp.2d 679 (E.D.Ky. 2000) [preliminary injunction issued against posting Ten Commandments and other documents in county courthouse]; *Suhre v. Haywood County, North Carolina*, 55 F.Supp.2d 384 (W.D.N.C. 1999) [allowing a courtroom display containing, among other things, an abridged version of the Ten Commandments]; *Harvey v. Cobb*, 811 F.Supp. 669 (N.D.Ga. 1993), *aff'd without opinion*, 15 F.3d 1097 (11th Cir.), *cert. denied*, 511 U.S. 1129 (1994) [display of Ten Commandments in a courthouse was not in an educational display and was unconstitutional].

purpose. (Pet.App. 8a).[5] The Governor does not argue that it was erroneous to place this burden on him.

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[5] The Governor appears to argue that the Court of Appeals erred in finding that the Ten Commandments was "inherently religious" (Pet.App. 9a), citing Russell Kirk for the proposition that the Ten Commandments had a major influence on the development of Western law and civilization. RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER (1974). However, there are numerous scholars and historians who disagree with this assertion. *See, e.g.*, Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 THE JOURNAL OF LAW AND RELIGION 525, 558 (1999-2000) [concluding that "[t]he historical record fails to support claims of a direct relationship between the law and the Ten Commandments."]; ISAAC KRAMNICK AND R. LAURENCE MOORE, THE GODLESS CONSTITUTION – THE CASE AGAINST RELIGIOUS CORRECTNESS 27-28 (1996) [noting the controversy at the time of the passage of the Constitution over the concerted and successful effort to make the Constitution a secular document]. Indeed, no less an important figure than Thomas Jefferson undertook to refute the misconception that the English common law was somehow based on Mosaic law by noting that the English common law predated the introduction of Christianity to England and that subsequent thereto Christianity simply was not adopted as a part of the common law. Letter from Thomas Jefferson to Dr. Thomas Cooper (February 10, 1814), *in* THOMAS JEFFERSON – WRITINGS, at 1321-1329 (Merrill D. Peterson ed. 1984). Jefferson further stated that "in answer to Fortescue Aland's question why the ten commandments should not now be a part of the common law of England? we may say that they are not because they never were made so by the legislative authority, the document which has imposed that doubt on him being a manifest forgery." *Id.* at 1329.

Although the question of the legal influence of the Ten Commandments may be debated, there is no doubt that the Ten Commandments is a living and meaningful holy document for Christians and Jews who gaze upon its words as the revealed truth from God and not as some sort of historical predecessor to

Instead, he argues that the Seventh Circuit misapplied the relevant test by requiring the Governor to demonstrate that his purpose was primarily secular and in failing to honor his statement of secular purpose. The Governor errs.

Under the first prong of *Lemon* "we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged." *Agostini v. Felton*, 521 U.S. 203, 223-24 (1997). Although the Court of Appeals stated that "the display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular" (Pet.App. 9a), the Court of Appeals did not indicate that it was requiring the Governor to demonstrate that the erecting of the monument was primarily for a secular purpose. Instead, the Court of Appeals properly stated that the question was whether the actual purpose of the planned monument was "to advance or inhibit religion." (Pet.App. 7a). And, the Court of Appeals noted that it was the Governor's obligation to demonstrate "a valid secular justification for planning to erect the monument." (Pet.App. 9a).

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our secular law today. There simply can be no dispute that at its core the Ten Commandments is a "sacred text." *Stone*, 449 U.S. at 42. Therefore, any discussion as to its display by the government must start with the realization that there must be a valid secular purpose to overcome this religiosity. As the Court of Appeals recognized, this is not an impossible burden (Pet.App. 7a-8a), but it is not a burden which the Governor met in this case.

In assessing the purpose, the Court of Appeals followed this Court's pronouncement that it is not enough for the State to enunciate a secular justification since, "[w]hen a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the court to 'distinguis[h] a sham secular purpose from a sincere one.' *Wallace [v. Jaffree]*, 472 U.S., at 75 (O'Connor, J., concurring in the judgment)." *Santa Fe Independent School District v. Doe*, 530 U.S. at 308. Therefore, it was proper for the Court of Appeals to examine the Governor's enunciated purposes for allowing a nearly six ton and seven foot high monument dominated by the text of the Ten Commandments to be placed on the grounds of the Indiana Statehouse.

Two of the reasons noted by the Governor are overtly religious: the Ten Commandments serve as a reminder of the "core values" of the United States and they contain "ideals" which we all need to be reminded of from time to time. As this Court noted in *Stone*, the values promoted by the Ten Commandments are religious values and the ideals are religious ones.[6]

As a third reason, the Governor proclaimed that the Ten Commandments are part of the legal and cultural

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[6] "The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. . . . Rather, the first part of the Commandments concern the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Stone*, 449 U.S. at 42.

history of the United States. However, in *Stone*, this Court specifically held that merely asserting, even in a writing that accompanied the posting of the Decalogue, the secular and historical significance of the Ten Commandments was not enough to overcome its religiosity; this " 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." 449 U.S. at 41. As in *Stone*, the Court of Appeals rejected the notion that merely saying the Ten Commandments was posted for a historical and secular reason is sufficient to dispel the religiosity of the document when the context does not confirm this purpose. There must be some demonstration from the context of the Ten Commandments that it is posted for historical or cultural purposes. Not only would the planned monument not be linked either in a visual or explanatory way with the other texts on the monument, there would be no link whatsoever between the Ten Commandments and the other material on the lawn of the Indiana Statehouse. The proposed site for the monument sits closest to a monument honoring the National Road and a tree planted by a former governor. There simply is nothing in the Ten Commandments monument which suggests a historical purpose other than the Governor saying so. This is not enough to create a secular purpose.[7]

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[7] The trial court specifically found that:

> at oral argument, the State was unable to elucidate any historical link between most of the commandments and "ideals animating American government." Counsel for the State, when asked about each individual commandment, was unable to provide any historical linkage between seven of the

2. The Seventh Circuit properly found that the nearly seven foot high and nearly six ton monument in the familiar tablet shape of the Ten Commandments, located at the seat of governmental power in Indiana, would convey a message of endorsement of religion

Under the effects prong of *Lemon*, as refined by the endorsement analysis, a court must determine "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J.,

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commandments and only weak historical links to three of them.

(Pet.App. 44a-45a). The district court further noted that:

> The only Commandments the State was able to link historically to legal or core values and ideals were "thou shalt not kill," "thou shalt not commit adultery," and "thou shalt not bear false witness against thy neighbors." However, even the links to these commandments were quite attenuated, as the State itself acknowledges that killing, in and of itself, is not illegal (moreover, the State itself authorizes death as punishment for certain crimes under certain circumstances), the links to adultery are found in statutes that are no longer on the books, and bearing false witness is only incorporated into our legal system to the extent that sworn witnesses are subject to perjury if they lie. Counsel also conceded that any association between the Second Commandment and old "Blue Laws" which in past times required certain commercial establishments to be closed for business on Sundays, and other such historical vestiges of the old sabbatic laws, is a stretch, and certainly not an expression of any "core" value or ideal.

(Pet.App. 45a).

concurring). In *County of Allegheny*, 492 U.S. at 597, this Court noted that "the effect of the government's use of religious symbolism depends on its context." In reviewing the context, the Court of Appeals in this case noted the obvious; the planned monument would not be in "some museum nestled in some secluded park" . . . [it would be at] the seat of Indiana government . . . . " (Pet.App. 10a).[8] Given this prominent location, "a reasonable observer would think that this monument, regardless of the message it conveys, occupies this location with the support of state government." (Pet.App. 10a-11a). The Court of Appeals correctly found that the reasonable observer would conclude that the monument conveys a religious message.

Looking solely at the monument itself, a reasonable observer would see a permanent, large and massive monument carved in the shape of the Ten Commandments and dominated by the text of the Decalogue. The shape of the monument is distinctive enough that it would be identifiable to any one who perceives its nearly seven foot high tablet shape from anywhere on the grounds of the Statehouse. "No viewer could reasonably think that it occupies this location without the support and approval of government." *County of Allegheny*, 492 U.S. at 599-600. The placement of a religious symbol at, or on, the seat of

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[8] The planned monument is therefore unlike the creche displayed in *Lynch* which was placed in a park. It is also unlike the Christmas tree and Menorah in *County of Allegheny* since the Court found that those symbols themselves have both secular and religious dimensions. 492 U.S. at 613-614. The Ten Commandments, like a creche, is unambiguously religious, although its religiosity can be mitigated by its context.

governmental power "[p]rovides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

A reasonable observer, viewing the monument itself, would not see anything to mitigate the religious message conveyed by the Ten Commandments. Even if the reasonable observer stops to look at the monument, as opposed to just recognizing it as a Ten Commandments monument from its shape, the reasonable observer would note that the most prominent document on the monument is the Ten Commandments. There is nothing which would serve to link the Bill of Rights, perhaps America's most important living and vibrant legal document, with a living and vibrant religious document which is sacred and holy to Jews and Christians other than the inevitable conclusion that these are two documents which the State of Indiana has deemed to be extremely important. This is endorsement.[9]

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[9] Of course, if a display of historical lawgivers was created, placing the Ten Commandments next to other laws and lawgivers throughout history might well mitigate the religious nature of the Ten Commandments. *See, e.g., County of Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring and dissenting). But, the Governor's repeated comparison of the Ten Commandments monument to the frieze in this Court is not accurate. The frieze on the walls of this Court which depicts Moses holding the Ten Commandments does not contain just Moses with figures from America's legal history. Instead it depicts lawgivers from throughout history including: Menes, Hammurabi, Solomon, Lycurgus, Solon, Draco, Confucius, Augustus, Napoleon, John Marshall, William Blackstone, Hugo Grotius, Saint Louis, King John, Charlemagne, Mohammed and Justinian. SUPREME COURT HISTORICAL SOCIETY, SUPREME COURT OF THE UNITED STATES 31. The placement of the Ten Commandments in the frieze is not an

Allegheny is clear; in determining context one must look to the distinct display. 492 U.S. at 598, n. 48. The distinct display here is the nearly six ton monument. However, the endorsement is not lessened even if the monument is viewed in the context of all the other items on the Statehouse lawn. There simply is nothing that would compel or allow a reasonable person to see some common historical link between the Ten Commandments and, for example, a statue of George Washington, a statue of Governor Hendricks, and a plaque commemorating the National Road. Merely placing a religious display with statues of important historical figures and commemorative plaques does not remove the endorsement present when the government places a religious display on public property. If the religiosity of the document is to be mitigated by context it must be placed into a context that has some unifying historical, legal, or other non-religious theme. The display that a reasonable observer would see when looking at the Statehouse has no unifying historical theme, or any other theme. The reasonable observer will see the Ten Commandments as a religious display, different from the statues and plaques.

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acknowledgment of any role that the Ten Commandments has had in the development of American law; it merely recognizes "great lawgivers." *County of Allegheny*, 492 U.S. at 653. (Stevens, J., concurring and dissenting).

But, when the Ten Commandments are placed next to the Bill of Rights, given that there is no natural connection between the two, the only reasonable conclusion which can be drawn is that the State of Indiana intends that its citizens honor and revere both. *County of Allegheny* does not stand for the proposition that any religious display can be "secularized" if it is displayed near something else.

C. The display of the Ten Commandments is not analogous to legislative prayer nor does it represent a common secular heritage

Eschewing *Lemon* or the endorsement analysis, the Governor argues that inasmuch as legislative prayer is allowed, *Marsh v. Chambers*, 463 U.S. 783 (1983), and inasmuch as ceremonial reference to God has been found in some circumstances to be constitutionally acceptable as expressing a cultural and secular message, rather than a religious one, the posting of the Ten Commandments must be deemed to be appropriate. In *Marsh*, this Court noted that there had been a long acceptance of legislative prayer and that legislative prayer had been in existence at the time that the Constitution was adopted. 463 U.S. at 792. *Marsh*, however, has been restricted to its particular facts, and is not useful here since, among other things, there is absolutely no evidence that the posting of Ten Commandments monuments was accepted at the time of the Constitution. *Edwards v. Aguillard*, 482 U.S. at 583, n. 4.

The posting of this sacred text is not a memorial to some common secular "heritage." Nor is it "cultural." Posting a document holy to Christians and Jews is directly contrary to what this Court has noted is our real heritage.

> This Nation is heir to a history and tradition of religious diversity that dates from the settlement of the North American Continent . . .
>
> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress

> shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . . " Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffree*, 472 U.S., at 52 . . . .

County of Allegheny, 492 U.S. at 590. The Court of Appeals correctly affirmed the trial court's grant of an injunction.

II. Contrary to petitioner's assertion, there is no significant conflict in the lower courts on the issue presented in this case

A. The proposed circuit conflict

In an attempt to manufacture a circuit conflict, the petitioner cites to only one circuit court case, *Anderson v. Salt Lake City Corp., supra*, which it claims is arguably in conflict with the Seventh Circuit's decision. In *Anderson*, a decision from 1973, the Tenth Circuit found that a three by five foot granite Ten Commandments monument erected on the city-county courthouse grounds was not a violation of the Establishment Clause. In so holding, the court concluded that the purpose and the primary effect of the monument were not religious. 475 F.2d at 34. The court held that the Ten Commandments has both secular and religious attributes. 475 F.2d at 33. The court also noted that there was nothing coercive about the display. *Id.*

Anderson preceded *Stone*. In *Stone* this Court specifically noted that, posted by itself, the Ten Commandments is a religious text without secular purpose.

> The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15.

449 U.S. at 42.

In *Summum v. Callaghan*, 130 F.3d 906, 912, n. 8 (10th Cir. 1997), the Tenth Circuit was asked to overrule *Anderson*, but found it unnecessary to do so since it found that the district court's decision could be reversed on other grounds. However, the court quoted the above passage from *Stone* and noted that "[w]e are not at liberty to overrule or disregard the precedent of an earlier panel absent en banc reconsideration or a superseding contrary decision of the United States Supreme Court . . . . We note, however, that our decision in *Anderson* has been called into question by the Supreme Court in *Stone v. Graham*." *Id.* (Internal citations omitted).[10] Given that the

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[10] Other courts have agreed that, after *Stone*, the continuing validity of *Anderson* has been called into doubt. *See, American*

1980 decision in *Stone* undercuts the validity of the 1973 decision in *Anderson* and the court that issued *Anderson* doubts its continued validity, there is not a significant conflict between *Anderson* and the Court of Appeals' decision in this case which justifies the grant of plenary review.[11]

B. The proposed conflict with a decision of a state court of last resort

Petitioner argues that the Seventh Circuit's decision conflicts with one decision of a state court of last resort, *State of Colorado v. Freedom from Religion Foundation, supra.* In *Freedom from Religion Foundation,* the Colorado Supreme Court, by a 4-3 margin, upheld as constitutional a relatively small (2-4 feet by 2½ feet) Ten Commandments monument. 898 P.2d at 1016. The monument was placed into a park that is part of a three block complex of public property, which includes the park and the grounds of the state capital. 898 P.2d at 1015. Throughout the park were large historical statues and memorials. 898 P.2d at

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Civil Liberties Union v. McCreary County, Kentucky, 145 F.Supp.2d at 847, n. 6; *Kimbley v. Lawrence County,* 119 F.Supp.2d at 871, n. 10; *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky,* 96 F.Supp.2d at 700.

[11] The *Anderson* decision is also questionable to the extent that it focuses on whether the display was coercive. Although coercive efforts by the Government may lead to an Establishment Clause violation, *see, e.g., Lee v. Weisman,* 505 U.S. 577 (1992), there is no requirement that an Establishment Clause violation be predicated on coercion. *County of Allegheny,* 492 U.S. at 597, n. 47; *School District of Abington Township v. Schempp,* 374 U.S. 203, 223 (1963).

1015-1016. The court examined the context of the monument and noted that it was placed inconspicuously into a park, "where citizens may be found by choice and are not necessarily present for purposes related to government." 898 P.2d at 1025. The Governor's Ten Commandments monument would neither be inconspicuous, nor in a spot unrelated to government. Obviously, the opposite is true. The monument would be on the grounds of the Statehouse, near a walkway leading directly into the Statehouse itself. (Pet.App. 75a). Its size and shape would guarantee that it would be conspicuous. Thus, like the Court of Appeals' decision below, the Colorado decision recognizes that context is a critical element in the Establishment Clause analysis. For that reason, it is entirely plausible that the Colorado Supreme Court would have reached a different conclusion if the monument there, like the monument here, had been conspicuously displayed on the property of a governmental building where citizens were forced to come into direct and unwelcome contact with it in the course of their civic activities. The Colorado decision, presenting an entirely different factual circumstance and context than this one, does not justify this Court granting plenary review in this case.

III. The fact that there are other Ten Commandments cases in the lower courts and that some state and local governments are interested in displaying the Ten Commandments is not a reason for granting plenary review

As the Governor demonstrates in his petition, the issue of the public display of the Ten Commandments is one which a number of lower courts and state and local

governments are facing. (*See* Petition at 11-13). However, this Court's Establishment Clause jurisprudence has set out the analysis which must be used to assess the constitutional validity of such displays and has emphasized that this inquiry must be context based and tailored to the precise circumstances of the display. *Lynch*, 465 U.S. at 678. No *per se* rule can be expressed indicating that the Ten Commandments can never, or can always, be displayed. Instead each case must be examined separately. And that is what the lower courts and the government entities are undoubtedly doing. Given that there is no significant conflict in the lower courts, the fact that lower courts have Ten Commandments cases pending or that this is an issue which state and local governments are considering is simply not a reason to grant plenary review. There is no further explication of the law which would change the context based inquiry that must be made in each case.

CONCLUSION

Certiorari is not warranted. The Court of Appeals' analysis conformed to the context based inquiry demanded by this Court. There is no meaningful conflict with prior decisions of a circuit court or state supreme court. The fact that there are other Ten Commandments cases in the lower courts, and interest in posting the Ten Commandments in various state or local governments, does not create a basis for the granting of plenary review inasmuch as this Court has established the test to be used

to judge the validity of the display of the Ten Commandments in those cases. Since there are no grounds for granting the petition, it should be denied.

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(3)

No. 01-966

IN THE

Supreme Court of the United States

FRANK O'BANNON, in his official capacity as Governor of Indiana,

Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

REPLY IN SUPPORT OF THE PETITION

1. Respondents have failed to negate the existence of a fundamental conflict among the federal circuits and a state supreme court on the permissibility of government Ten Commandments displays. Indeed, Respondents concede the existence of such a conflict, but urge that it is not "significant" or "meaningful" enough to justify certiorari. Opp. 20, 22, 24. That is not the case.

To begin, Respondents do not deny that *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973), is diametrically in conflict with this case. Instead, Respondents merely question *Anderson*'s continuing vitality. Opp. 21. But the Tenth Circuit itself reconfirmed *Anderson*'s vitality in *Summum v. Callaghan*, 130 F.3d 906 (10th Cir. 1997), stating, "We are not at liberty to overrule or disregard the precedent of an earlier panel absent *en banc* reconsideration or a superseding contrary decision of the United States Supreme Court." *Id.* at 912 n.8. Also, lower courts within the Tenth Circuit continue to enforce *Anderson*. *See Summum v. City of Ogden*, 152 F. Supp. 2d 1286, 1294 (D. Utah 2001) ("*Anderson* . . . is still good law and this Court is disciplined and bound by *Anderson*. Consistent with *Anderson*, this Court holds that the City of Ogden did not violate the Establishment Clause by adopting and displaying the 'Ten Commandments' monument donated by the Eagles."). Further, any uncertainty about *Anderson* only underscores the need for this Court to intercede here and settle the matter nationally.

With respect to *State of Colorado v. Freedom from Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995) (en banc), Respondents spend nearly two pages describing facts about that case, only to highlight the similarities between it

and this case. Both involve state government displays of the Ten Commandments; both displays would be on state capital grounds; and both state capital grounds are covered with other historical statues and monuments. Respondents attempt to distinguish *Colorado* simply because the monument in this case may be easier to spot. But there is nothing in the decision below—or in the *Colorado* decision—to suggest that either court would have reached a different result had the facts been so insignificantly altered.

Indeed, the arguable uniqueness of the holiday displays at issue in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), did not impede certiorari. To the contrary, the Court reviewed those cases because they presented facts and issues "essentially like" those found in displays across the country. *Lynch*, 465 U.S. at 671. The presence of a single essential ingredient—the government's desire to display the Ten Commandments on government property—may, in fact, mean that the Court's decision in this case would resolve a substantial volume of outstanding and future litigation. Certainly, Respondents are wrong to suggest that the Court should never grant certiorari in cases such as this because minor facts would always vary.

2. Respondents also fail to undermine the fact that a decision from this Court would provide necessary guidance in a vast number of cases around the country. As shown in the petition (Pet. 11-12), there are already at least *seventeen* government Ten Commandments display cases pending, with the possibility of dozens, scores, or even hundreds more coming down the pike. Indeed, Respondents acknowledge, as they must, that the issue is widespread and recurring. Opp. 23-24. But with fundamental conflicts lurking in the federal circuits and a state supreme court, pending and future

Ten Commandments display cases cannot be resolved in any consistent way without the Court's guidance. There is no better vehicle for providing such guidance than this case, and no better time to provide it than now.

3. In the end, Respondents' position is that the law is clear and that lower courts need only apply that clear law to facts. But even the district court below disagreed with that notion when it acknowledged that tackling this case was "no small assignment, given the profusion and confusion reflected in the case law and in Supreme Court precedent." Pet. App. 38a.

In truth, pitfalls in Establishment Clause doctrine await at every turn. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is the seminal decision for Establishment Clause cases, but lower courts more often rely on a one-Justice concurrence from *Lynch* and a highly fractured decision in *Allegheny* that produced no majority for any single rationale underlying the results. Further, the *Lemon* framework may not apply at all with respect to government acknowledgements of religious heritage or historic traditions involving religion. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). More recently, *Mitchell v. Helms*, 530 U.S. 793 (2000), produced two separate supporting rationales for the result, but neither garnered a majority vote. *Id.* at 801 (plurality opinion of Thomas, J.); *id.* at 836 (O'Connor, J., joined by Breyer, J., concurring in the judgment). And courts with Ten Commandments cases face even more confusion given the per curiam opinion in *Stone v. Graham*, 449 U.S. 39 (1980), which invalidated a public schoolroom display of the Ten Commandments, but which is "hardly controlling" in other contexts. *City of Elkhart v. Books*, 121 S. Ct. 2209, 2210 (2001) (Rehnquist, C.J., dissenting from the denial of certiorari). This woolly landscape has led one Justice to

posit that "[s]ubstantial revision of our Establishment Clause doctrine may be in order . . . ." *Allegheny*, 492 U.S. at 656 (Kennedy, J., concurring in the judgment in part and dissenting in part).

Perhaps the Second Circuit put it best when it observed that, "[i]n the wake of a number of fragmented Court [Establishment Clause] decisions over the past decade, the governing law remains in doubt." *DeStefano v. Emergency Housing Group., Inc.*, 247 F.3d 397, 405 (2d Cir. 2001). Nowhere is that doubt more apparent than with respect to the permissibility of government Ten Commandments displays. The lower courts are in conflict on this issue, and there are many cases pending, with many more to come. The Court should hear this case to provide much-needed national guidance.

CONCLUSION

The petition for a writ of certiorari should be granted.

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(4)

No. 01-966

In the Supreme Court of the United States

FRANK O'BANNON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF INDIANA,
Petitioner,

v.

INDIANA CIVIL LIBERTIES UNION, JOAN LASKOWSKI, ALICE BENNET, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF THE STATES OF TEXAS, ALABAMA, MISSISSIPPI, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause permits the government to display the Ten Commandments to memorialize the role the Commandments have played in the development of the rule of law and of the American legal system.

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INTEREST OF THE AMICI CURIAE

Texas and other states have monuments on government property displaying the Ten Commandments, as do many local governmental entities in the states. Litigation seeking to remove or stop the erection of these monuments is occurring frequently around the country. Many well-meaning state and local government officials increasingly find themselves between the proverbial rock and a hard place when confronted by views of the monuments' opponents and proponents. The difficulties of this issue are compounded by the existence of conflicting federal- and state-court decisions on just how far governments may go in acknowledging religion as a part of our national heritage through the display on public property of either solely religious or mixed religious and nonreligious symbols.

This Court has not directly spoken on the issue of government accommodation of mixed secular and religious public displays since 1989 in *County of Allegheny v. ACLU*, concerning seasonal holiday displays. Even though the monument here is not a seasonal holiday display, the Seventh Circuit applied *County of Allegheny*, and the Endorsement Test that it adopted, to decide this case. Despite opportunities over the past twelve years, the Court has not revisited *County of Allegheny* in a mixed religious and secular display context. The amici states respectfully submit the Court should revisit *County of Allegheny* and the Endorsement Test by taking this case. Through this case, the Court will provide state and local government officials much-needed guidance and clarification in this specific area of the law, as well as in the wider context of Establishment Clause jurisprudence. To borrow an expression from Justice Scalia, the amici states are urging certiorari be granted in this case so that the Court may "establish the margins of tolerable

diversity" among the lower courts on the frequently recurring issue of Ten Commandment monuments on public property.[1]

SUMMARY OF ARGUMENT

This case presents an important question of national interest, namely: to what extent may government acknowledge religion as being an important part of our Nation's heritage? By taking this case, the Court would provide much-needed guidance and clarification in this unclear, uncertain, and conflicting area of the law.

Indiana's monument in this case passes constitutional muster under the Establishment Clause. The Establishment Clause is elastic enough to permit monuments such as Indiana's, which simply acknowledges or recognizes the important role the Ten Commandments have played in our nation's history and development.

Finally, the Seventh Circuit has departed from the established precedents of this Court by improperly concluding that Indiana's monument violates the Establishment Clause by impermissibly linking the text of the Ten Commandments to the texts of the Preamble to the 1851 Indiana Constitution and the Bill of Rights in the United States Constitution. Under the Seventh Circuit's flawed "impermissibly links" analysis, no monument on government property displaying a religious text or symbol would ever be constitutional. Linkage of religious and secular texts, alone, does not inevitably lead to the conclusion that government is endorsing religion.

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1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186 (1989).

ARGUMENT

I. THE PERMISSIBILITY OF GOVERNMENT DISPLAYS OF THE TEN COMMANDMENTS RAISES A QUESTION OF NATIONAL IMPORTANCE.

There is a debate raging in this country over whether state and local governments may display the Ten Commandments on public property. "What some see as a legal violation, others view as a symbol of our nation's roots." Rob Schmitz, *The Ten Commandments: Religious or Historical Symbol?* (Minnesota Public Radio broadcast, Sept. 10, 2001), *available at* http://news.mpr.org/features/200109/10_scmitzr_laxten-m/index.shtml. Opponents often complain that a monument displaying the Ten Commandments "sends the message that people who adhere to its principles 'are the inside, favored group' . . . and people with other beliefs are outsiders." Joe Garner, *ACLU Sues Over Commandments*, MILWAUKEE J. SENTINEL, May 6, 2001, at 12A, *available at* 2001 WL 9354431. They see the display as a "thinly disguised attempt[] to use government to promote religion" and send a "distinctly Judeo-Christian message." *See* Joshua Hammann, *ACLU Sues State to Stop Ten Commandments at Capitol*, ASSOCIATED PRESS, July 11, 2000, *available at* WESTLAW, ALLNEWSPLUS database, 7/11/00 APWIRES 02:00:00.

On the other hand, supporters may see efforts to remove or block the erection of such monuments as "part of a systematic campaign . . . to denigrate God . . . in public life" and as "attempts to deconstruct the American way of life." *See id.*; John Elvin, INSIGHT MAG., June 7, 1999, at 34, *available at* 1999 WL 8673936. They view such monuments as an "acknowledg[ment] of their religious heritage," Robert E. Meyer, *Some Misunderstand First Amendment*, MILWAUKEE J. SENTINEL, Aug. 11, 2001, at 14A, *available at* 2001 WL 9372349, and as a recognition of the roots of the American justice system. John Hostettler, *The Church/State*

Separation Fallacy, (Aug. 1, 2001), *available at* 2001 WL 5421955. Supporters argue that "the Ten Commandments are as much civic and historic treasures as they are religious," and that the Decalogue is "a code of moral conduct that promotes respect for our system of laws and the good of society." *Display the Ten Commandments: An Important Step in Promoting Morality*, Christian Law Association, *available at* http://www.christianlaw.org/display_10c.html.

The stakes in this debate are high. The importance of the issue in this case goes beyond simply whether government may display the Ten Commandments on a monument on public property. The larger issue is the extent to which government may acknowledge and accommodate religion as being an important part of our nation's heritage. The amici states respectfully urge the Court to intercede and resolve this important issue of national interest in this case. State and local government officials, who are increasingly finding themselves caught in the middle of these two sides, would welcome and be grateful for any clear direction from this Court.

II. THE LAW IS UNCLEAR, UNCERTAIN, AND CONFLICTING ON WHETHER GOVERNMENT MONUMENTS DEPICTING THE TEXT OF THE TEN COMMANDMENTS OFFEND THE ESTABLISHMENT CLAUSE.

The ongoing debate in the American community at large has been reflected in this Court's opinions and the opinions of lower state and federal courts over the past several decades. In a case concerning whether a state statute requiring the posting of the Ten Commandments in public school classrooms violated the Establishment Clause, this Court described the Commandments as an "undeniably . . . sacred text in the Jewish and Christian faiths" that "do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness." *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (per curiam). Despite the state legislature's stated

purpose in posting the Commandments to recognize them "as the fundamental legal code of Western Civilization and the Common Law of the United States," the Court in *Stone* held that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment." *Id.*, at 41.

Stone's holding, however, is not so far-reaching that it necessarily bars displays of the Ten Commandments in situations other than their display in classrooms containing impressionable schoolchildren. The Court has "been 'particularly vigilant' in monitoring compliance with the Establishment Clause in that context, where the State exerts 'great authority and coercive power' over students through mandatory attendance requirements." *City of Elkhart v. Books*, 121 S.Ct. 2209, 2211 (2001) (Rehnquist, C.J., dissenting from denial of petition for writ of certiorari). Chief Justice Rehnquist has cautioned that the Court has "never determined, in *Stone* or elsewhere, that the Commandments lack a secular application." *Id.* The Ten Commandments, he has written, "have secular significance, as well, because they have made a substantial contribution to our secular legal codes." *Id.* And "[e]ven *Stone* noted that 'integrated into the school curriculum' the Commandments 'may constitutionally be used in an appropriate study of history, civilization, [or] ethics." *Id.* (quoting *Stone*, 449 U.S., at 42).

Some lower federal courts of appeals and state courts have also noted the various messages the Ten Commandments may transmit. The Seventh Circuit Court of Appeals has acknowledged: "The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by government as playing such a role in our civic order." *Books v. City of Elkhart*, 235 F.2d 292, 302 (CA7 2000). The Tenth Circuit Court of Appeals has stated that "an ecclesiastical background does not necessarily mean that the Decalogue is primarily religious in character—it also has substantial secular attributes." *Anderson v.*

Salt Lake City Corp., 475 F.2d 29, 33 (CA10 1973). And the Colorado Supreme Court has stated that it is a "historical fact the Ten Commandments has served over time as a basis for our national law." *State v. Freedom from Religion Found.*, 898 P.2d 1013, 1024 (Colo. 1995).

As far as this Court is concerned, it appears the question whether the Establishment Clause permits an outdoor monument on government property portraying the Ten Commandments, either alone or with other completely nonreligious words or symbols, is an open one. *See City of Elkhart*, 121 S.Ct., at 2211–12 (Rehnquist, C.J., dissenting from the denial of writ of certiorari). As for the lower state and federal courts, the cases are conflicting. The Colorado Supreme Court and the Tenth Circuit have rejected Establishment Clause challenges mounted against monuments on public property depicting the Ten Commandments along with other nonreligious symbols. *See Anderson*, 475 F.2d, at 34; *Freedom from Religion Found.*, 898 P.2d, at 1026–27. The Seventh Circuit, however, has sustained similar challenges. *See Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 773 (CA7 2001), *at* App. 1a, 13a; *Books*, 235 F.3d, at 308.

The heart of the conflict lies in the lower courts' widely divergent applications of the first two prongs of the test in *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). These prongs ask (1) whether the challenged state action has a secular purpose, and (2) whether the primary effect of the state action advances or inhibits religion. *Id.*, at 612. This Court has subsequently recast *Lemon*'s first two prongs by distilling them to mean that government may neither endorse nor disapprove of religion. *County of Allegheny v. ACLU*, 492 U.S. 573, 600–01 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

The endorsement test forbids "government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." *County of Allegheny*, 492 U.S., at 593; *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in judgment). In determining whether government's use of an object with religious meaning has the effect of endorsing religion, the question is "what viewers may fairly understand to be the purpose of the display." *County of Allegheny*, 492 U.S., at 595; *Lynch*, 465 U.S., at 692 (O'Connor, J., concurring). Thus, the context in which the government uses a religious symbol is relevant to the endorsement inquiry. *County of Allegheny*, 492 U.S., at 597. And government action is judged "in its unique circumstances to determine whether it constitutes and endorsement or disapproval of religion." *Lynch*, 465 U.S., at 694 (O'Connor, J., concurring); *cf. Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000) ("Our inquiry into this question [whether student-led prayer at varsity football games violates the Establishment Clause] not only can, *but must*, include an examination of the circumstances surrounding the enactment." [emphasis added]). The "history and ubiquity" of a government display of a religious symbol is relevant to the uniqueness of the circumstances. *See County of Allegheny*, 492 U.S., at 625 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring).

The effect of a government practice is evaluated by the objective standard of the reasonable observer. *County of Allegheny*, 492 U.S., at 620; *id.*, at 631 (O'Connor, J., concurring in part and concurring in judgment); *Lynch*, 465 U.S., at 690 (O'Connor, J., concurring). The reasonable observer is deemed to be better informed than a casual passerby. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in judgment). And the perceptions of particular individuals are irrelevant. *Id.* Rather, under the reasonable observer inquiry, the "concern is with the political community writ large." *Id.*; *cf. Good News Club v.*

Milford Cent. Sch., 121 S.Ct. 2093, 2106 (2001) ("We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might perceive.").

III. INDIANA'S MONUMENT DOES NOT OFFEND THE ESTABLISHMENT CLAUSE.

Given the foregoing standards, a reasonable observer would not perceive Indiana's display of the Ten Commandments with other secular and historical texts or symbols as sending "an '*unmistakable* message' of government support for, or endorsement of, religion" for several reasons. *City of Elkhart*, 121 S.Ct., at 2212 (Rehnquist, C.J., dissenting from denial of petition for writ of certiorari) (emphasis added) (quoting *County of Allegheny*, 492 U.S., at 600). *First*, as already mentioned above, a reasonable observer understands that the Ten Commandments do not transmit a singularly religious message. They convey secular messages as well. "[T]he Decalogue is at once religious and secular." *Anderson*, 475 F.2d, at 33. And the Commandments are "an affirmation of at least a precedent legal code." *Id.* They also reflect "ethical or moral principles" and "are expressions of universal standards of behavior common to all western societies." *Freedom from Religion Found.*, 898 P.2d, at 1024. "[I]t can be said that the last six of the Ten Commandments have counterparts in all known cultures." Harold J. Berman, *Law and Logos*, 44 DEPAUL L. REV. 143, 159 (1994). "[T]hese moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution." *Id.* In this sense, the Commandments are not as sectarian and are much

less religiously obtrusive than a creche, *see County of Allegheny*, 492 U.S., at 598, or a Latin cross. *See, e.g., Separation of Church & State Comm.*, 93 F.3d 617 (CA9 1996) (per curiam).

In sum,

> "[i]t is axiomatic that many of the principles contained in the Ten Commandments are fundamental to the Western legal tradition. Prohibitions on murder, theft, and perjury are found in nearly every legal code. Notions of respect for one's parents and admonitions against adultery are also implicit, if not explicit, in the quasi-legal realm of normative rules that order many societies. Few people, if any, would dispute that the Ten Commandments . . . inform our notions of right and wrong and, as such, have influenced the development of Western law of which the American legal system is a part." Steven K. Green, *The Fount of Everything Just and Right? The Ten Commandments as a Source of American Law*, 14 J. L. & RELIGION 525, 525 (1999–2000); *see also* Berman, *Law and Logos*, 44 DEPAUL L. REV., at 159–60 (noting that Ten Commandments' "injunctions are primarily moral, yet they also have social and a legal dimension").

This fact is reinforced by the presence of two undeniable secular texts on Indiana's monument: the Bill of Rights from the United States Constitution, and the Preamble to the 1851 Indiana Constitution. Taken together in context, the message is unmistakable that these texts are foundational aspects of Indiana's government and values. A reasonable observer, being well-informed of the United States and Indiana history, would perceive this.

Second, considering the larger context of the entire capitol grounds, other statues and monuments, honoring as they do important historical events and persons, combine with the

challenged monument to celebrate Indiana's rich history. In considering the monument here, the Seventh Circuit focused too narrowly on the Ten Commandments when the capitol grounds has many other objects, each with its own "focal point" and historical message. *County of Allegheny*, 492 U.S., at 598 (discussing the display in *Lynch* that "composed a series of figures and objects, each group of which had their own focal point"). Just as the seasonal holiday display in *Lynch* contained other items besides the creche that took the focus off of the religious aspect of the creche and put it into the context of the origin of the holiday season, the other objects on the statehouse grounds place the Ten Commandments in a larger historical context, instead of simply a narrow, sectarian context.

Third, contrary to the Seventh Circuit's belief, having the three texts on different sides of this block monument and having larger lettering for the Commandments, making it more easily viewed from a distance, does not lead a reasonable observer to conclude Indiana is endorsing religion. As in the larger context of the capitol grounds, the reasonable observer inquiry does not allow for such a narrow focus. Unlike a casual passerby, a reasonable observer takes into account each aspect of the monument and all of its texts. *See Pinette*, 515 U.S., at 779 (O'Connor, J., concurring in part and concurring in judgment). Also, the Preamble to the 1851 Indiana Constitution and the Bill of Rights each have their own focal point and story to tell. The Ten Commandments do not stand alone and thus send only one unmistakable message endorsing religion. *See County of Allegheny*, 492 U.S., at 598.

Fourth, having secular texts on the same monument as the text of the Ten Commandments does not lead to the unmistakable conclusion that the three texts are linked in such a way that Indiana is endorsing religion. Rather, an observer would reasonably believe that the "reason or effect" of the secular texts "happen[] to coincide or harmonize with the [religious] tenets" expressed by the Ten

Commandments. *See Lynch*, 465 U.S., at 682. The amici states further discuss this facet of the Seventh Circuit's decision in Part V, below.

IV. THE COURT SHOULD GRANT THE WRIT TO CLARIFY WHETHER GOVERNMENT MAY ACKNOWLEDGE RELIGION'S ROLE AS A FOUNDATIONAL ASPECT OF OUR NATION'S LAWS AND HERITAGE.

"[I]t has never been thought possible or even desirable to enforce a regime of total separation between religion and government." *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 760 (1973). The overarching principle animating the Establishment Clause is government neutrality towards religion. *See Wallace*, 472 U.S., at 60. That is, government cannot favor religion over nonreligion, and it cannot favor one religion over another. *See Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963). At the same time, government cannot "show a callous indifference to religious groups" because "[t]hat would be preferring those who believe in no religion over those who do believe." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952); *see also Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1946) (stating the "First Amendment requires the State to be a neutral in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary"). As Justice Goldberg wrote in *Abington School District v. Schempp*,

> "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it. Neither government nor this Court can or should ignore the significance of the

> fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings Government must inevitably take cognizance of the existence of religion." 374 U.S., at 306 (Goldberg, J., concurring).

The Court has also recognized that complete separation between government and religion "'is not possible in an absolute sense'" and that "'[s]ome relationship between government and religious organizations is inevitable.'" *Lynch*, 465 U.S., at 672 (quoting *Lemon*, 403 U.S., at 614). "Nor does the Constitution require complete separation of church and state; it affirmatively mandates *accommodation*, not merely tolerance, of all religions, and forbids hostility towards any." *Id.*, at 673 (emphasis added); *see also County of Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in judgment and dissenting in part) ("Government policies of accommodation, acknowledgment, and support of religion are an accepted part of our political and cultural heritage."). The Establishment Clause is elastic enough to "permit[] government some latitude in recognizing and accommodating the central role religion plays in our society." *County of Allegheny*, 492 U.S., at 657 (Kennedy, J., concurring in judgment and dissenting in part). Through accommodation, government shows "respect to the religious nature of our people." *Zorach*, 343 U.S., at 314. In sum, the amici states believe that between the two extremes of government endorsement of religion and government hostility against religion, there lies a zone in which government may recognize or acknowledge the important foundational role religion has played in our nation's laws and history.

This zone explains why monuments and public buildings in our nation's capitol may depict religious symbols and words. The apex of the Washington Monument, for example, is inscribed with the Latin phrase Laus Deo—"Praise be to God"—on the aluminum tip

of its capstone. LOUIS TORRES, "TO THE IMMORTAL NAME AND MEMORY OF GEORGE WASHINGTON": THE UNITED STATES ARMY CORPS OF ENGINEERS AND THE CONSTRUCTION OF THE WASHINGTON MONUMENT 82–84 (U.S. Gov't Printing Office, 1985). Also, the entrance to the National Archives Building displays a bronze medallion of the Ten Commandments surrounded by four winged figures representing Legislation, Justice, History, and War and Defense. Chuck Donovan & Christina Darnell, *Hallowed Ground: Washington's Monuments to Faith, Family and Freedom*, Family Research Council, *available at* http://www.religiousliberty.com/article (last visited Jan. 10, 2002). Depictions of Moses holding the Ten Commandments are even displayed at the Supreme Court Building. *County of Allegheny*, 492 U.S., at 652 (Stevens, J., concurring in part and dissenting in part).

It would be ludicrous to suggest that these and all other religious words and symbols on national monuments and buildings must be removed because they violate the Establishment Clause. If the federal government may display such words and symbols, the states should be permitted to display similar objects. There is no principled reason why the federal government may exhibit such displays, but state and local governments cannot.

Despite this Court's recognition of the concept of accommodation concerning the religion clauses of the First Amendment, the contours and features of the concept are obscure. In *County of Allegheny*, the various opinions reflected divergent views as to how accommodation operates under the Establishment Clause and whether it even applies to government display of religious symbols. Justice Blackmun, writing for the Court, stated that "an accommodation of religion, in order to be permitted under the Establishment Clause, must lift 'an identifiable burden *on the exercise of religion*," *County of Allegheny*, 492 U.S., at 613 n.59 (emphasis in original) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327,

348 (1987) (O'Connor, J., concurring in judgment)), and that "[t]he display of a creche in a courthouse does not remove any burden on the free exercise of Christianity." *Id.*, at 601 n.51. Justice Kennedy, joined by Chief Justice Rehnquist, and Justices Scalia and White, wrote that

> "[c]ontrary to the assumption implicit in this analysis, however, we have never held that government's power to accommodate and recognize religion extends no further than the requirements of the Free Exercise Clause. To the contrary, '[t]he limits of permissible state accommodation to religion are by no means coextensive with the non-interference mandated by the Free Exercise Clause.'" *Id.*, at 663 n.2 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970)); *cf. Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting).

Despite the apparent disagreement amongst the members of this Court in *County of Allegheny*, the majority seemingly did not reject the notion that some amount of government accommodation of religious displays may be appropriate. Justice Blackmun, carefully limiting his comments to the facts in *County of Allegheny*, wrote:

> "One may agree with Justice KENNEDY that the scope of accommodations under the Establishment clause is larger than the scope of accommodations mandated by the Free Exercise Clause. . . . But a category of 'permissible accommodations of religion not required by the Free Exercise Clause' aids the creche on the Grand Staircase not at all." *County of Allegheny*, 492 U.S., at 613 n.59.

Given the Court's statements in *Lynch* about accommodating religion, 465 U.S., at 683, and the less-than-definitive explication of what accommodation means under the Establishment Clause in *County of Allegheny*, it should not be surprising that state and local

governments around the country increasingly find themselves litigating whether a monument on government property displaying the Ten Commandments violates the Establishment Clause. *See, e.g., Ind. Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (CA7 2001); *Books*, 235 F.2d , at 292; *Anderson*, 475 F.2d, at 29; *Adland v. Russ*, 107 F.Supp.2d 782 (E.D. Ky. 2000); *Freedom from Religion Found.*, 898 P.2d, at 1013. *See generally* Freedom from Religion Foundation, Action Alert (Sept. 5, 2001), *at* http://www.ffrf.org/action/10comm.html (last visited Jan. 5, 2002) (Internet web site urging persons to protest Ten Commandment monuments on state property in Alabama, Arizona, and Texas). As a consequence, government officials find themselves "struggling with how [their] oath of office to uphold the Constitution fits with" permitting such monuments to be displayed on government lands. *See* Schmitz, *supra*. Thus, the amici states are keenly interested in the Court granting certiorari in this case so that much-needed clarification and guidance may be provided to government officials to aid them in navigating the stormy sea between the proscriptions against endorsement of religion and hostility against religion.

V. THE SEVENTH CIRCUIT'S "IMPERMISSIBLY LINKS" ANALYSIS IS CONTRARY TO THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

The Seventh Circuit mistakenly held that the presence of other, secular texts—namely, the Bill of Rights of the United States Constitution and the Preamble to the 1851 Indiana Constitution—on the same monument as the text of the Ten Commandments "impermissibly links religion and law," making the monument unconstitutional under the Establishment Clause. *See O'Bannon*, 259 F.3d, at 773. This conclusion is contrary to the Court's jurisprudence about the role context plays in establishing whether displays containing religious words or symbols violates the Establishment Clause.

In *Lynch*, this Court held that the inclusion of a creche in the context of a seasonal holiday display did not violate the Establishment Clause. *See* 465 U.S., at 684. In describing the overall holiday setting in that case, Justice O'Connor wrote that

> "[a]lthough the religious and indeed sectarian significance of the creche . . . is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion." 465 U.S., at 692 (O'Connor, J., concurring).

Similarly, in this case, although the secular texts on Indiana's proposed monument do not eliminate the religious significance of the Ten Commandments, they nevertheless do negate any message of endorsement of religion. As already mentioned above, a reasonable observer, viewing the monument in context, would conclude that the Ten Commandments played some foundational role in the laws of Indiana and the United States. A reasonable observer would not believe that Indiana was endorsing religion.

Indeed, far from endorsing religion, the monument's display of the Ten Commandments is merely an "acknowledgment" of the role of the Ten Commandments in the development of law. As Justice O'Connor concluded in *Lynch*,

> "the government's display of the creche in this particular physical setting [is] no more an endorsement of religion than such governmental 'acknowledgments' of religion as legislative prayers of the type approved in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), government declaration of Thanksgiving as a public

> holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court.'" *Id.*, at 693 (O'Connor, J., concurring).

The same reasoning applies to Indiana's monument in this case. Because it is a mere "acknowledgment" of religion, it does not endorse religion and does not violate the Establishment Clause.

The Seventh Circuit's holding that the Indiana monument "impermissibly links" religion and law[2] cannot be squared with *Lynch*, *Marsh*, and *County of Allegheny*. The Seventh Circuit appears to believe that any "link" between religion and law or government violates the Establishment Clause. That is simply not true. If it were, the Court would not have approved the legislative prayers in *Marsh*. Although such prayers undoubtedly "linked" religion and law, they did not violate the Establishment Clause because they did not amount to a governmental endorsement of religion. Instead, they were a mere acknowledgment of religion. *See Lynch*, 465 U.S., at 692–93 (O'Connor, J., concurring). The same is true of Indiana's display of the Ten Commandments.

Similarly, although the creche in the *Lynch* holiday display and the menorah in the *County of Allegheny* holiday display could be said to have "linked" religion and the government's celebration of a secular holiday, they, too, in the context of their physical settings,

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2. The Seventh Circuit has used its "impermissibly links" test to invalidate the display of another Ten Commandments case. *See Books*, 235 F.3d, at 306–07 (holding that the presence of an American eagle gripping the national colors at the top of a monument containing the text of the Ten Commandments "specifically links religion . . . and civil government," and holding that the proximity of the monument to the municipal building, above the door of which were inscribed the words "Dedicatum Justitia," gave the impression that "the only 'law' displayed for doing justice is the monument bearing the Ten Commandments").

conveyed no message of endorsement of religion. *County of Allegheny*, 492 U.S., at 620–21; *Lynch*, 465 U.S., at 693 (O'Connor, J., concurring in judgment). Under the Seventh Circuit's reasoning, *Lynch*, *Marsh*, and *Allegheny* would have come out differently.

If the Seventh Circuit's holding were the law, then few, if any, government displays containing items with religious significance could ever pass constitutional muster. If a religious text or object appeared by itself, it likely would lack the context necessary to avoid conveying a message of endorsement. But if it appeared together with secular texts or objects, under the Seventh Circuit's reasoning, the display as a whole would "impermissibly link" religion with the character of the secular items, thereby violating the Establishment Clause. In essence, the Seventh Circuit seems to believe that the mere juxtaposition of a religious and a secular text or object related to government makes a display unconstitutional as a matter of law, neglecting to employ the Court's endorsement test and ignoring the Court's practice of conducting "case-specific examinations of the challenged government action." *County of Allegheny*, 492 U.S., at 623 (O'Connor, J., concurring).

The Seventh Circuit's "impermissibly links" analysis, if adopted, would essentially eliminate all displays containing some religious aspect. All traces of religion would have to be purged from government property—including monuments that have stood for decades and carry concomitant historical and cultural significance. That result would fly in the face of the Court's intent to "avoid[] drawing lines which entirely sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens for to do so would exhibit not neutrality but hostility to religion." *Id.* To avoid this unwarranted logical progression, the Court should grant certiorari in this case and hold that a mere "link" between religion and law, justice, or some other

concept related to government does not violate the Establishment Clause.

CONCLUSION

For these reasons, the amici states respectfully request that the petition for writ of certiorari be granted.

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